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**E-Filing**

Attorney for Petitioner  
ANGEL JESUS ALVAREZ

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANGEL JESUS ALVAREZ,

Petitioner,

v.

ROBERT AYERS, JR., Warden,

Respondent.

06 5027

Case No. \_\_\_\_\_

**MJJ**

**PETITION FOR WRIT OF HABEAS CORPUS**

**PURSUANT TO 28 U.S.C. § 2254**

**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

Name ALVAREZ Angel J.  
 (Last) (First) (Initial)

Prisoner Number P-81998

Institutional Address S.Q.S.P./North Block, General Delivery  
San Quentin, CA 94974

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

ANGEL JESUS ALVAREZ  
 (Enter the full name of plaintiff in this action.)

vs.

ROBERT AYERS, JR., Warden

(Enter the full name of respondent(s) or jailor in this action)

Case No. \_\_\_\_\_  
 (To be provided by the clerk of court)

**PETITION FOR A WRIT  
 OF HABEAS CORPUS**

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

## 1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Santa Clara County Superior Court - San Jose, CA

Court

Location

(b) Case number, if known 198084

Date: May 26, 2000

(c) Date and terms of sentence Terms: 17 yrs. to life;

\$10,000 restitution fine

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes X No       

Where? CDC - San Quentin State Prison

Name of Institution: San Quentin State Prison

Address: S.Q.S.P./North Block  
San Quentin, CA 94974

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Penal Code section 269; Penal Code section 273D(A);

Penal Code section 273a(b)

3. Did you have any of the following?

Arraignment: Yes X No \_\_\_\_\_  
 Preliminary Hearing: Yes X No \_\_\_\_\_  
 Motion to Suppress: Yes \_\_\_\_\_ No X

4. How did you plead?

Guilty \_\_\_\_\_ Not Guilty X Nolo Contendere \_\_\_\_\_

Any other plea (specify) \_\_\_\_\_

5. If you went to trial, what kind of trial did you have?

Jury X Judge alone \_\_\_\_\_ Judge alone on a transcript \_\_\_\_\_

6. Did you testify at your trial? Yes X No \_\_\_\_\_

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes X No \_\_\_\_\_  
 (b) Preliminary hearing Yes X No \_\_\_\_\_  
 (c) Time of plea Yes X No \_\_\_\_\_  
 (d) Trial Yes X No \_\_\_\_\_  
 (e) Sentencing Yes X No \_\_\_\_\_  
 (f) Appeal Yes X No \_\_\_\_\_  
 (g) Other post-conviction proceeding Yes X No \_\_\_\_\_

8. Did you appeal your conviction? Yes X No \_\_\_\_\_

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes X No \_\_\_\_\_

Year: 2000 Result: Conviction Affirmed - 10/25/02

Supreme Court of California Yes X No \_\_\_\_\_

Year: 2002 Result: Pet. for Review Denied - 1/15/03

Any other court Yes \_\_\_\_\_ No X

Year: \_\_\_\_\_ Result: \_\_\_\_\_

(b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes X No       

2 (c) Was there an opinion? (Unpub.,) Yes X No       

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes        No X

5 If you did, give the name of the court and the result:

6 \_\_\_\_\_  
7 \_\_\_\_\_

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to  
9 this conviction in any court, state or federal? Yes X No       

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that  
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed  
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit  
13 for an order authorizing the district court to consider this petition. You may not file a second or  
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28  
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following  
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: California Supreme Court  
19 Type of Proceeding: Habeas Petition - Petition for Review

20 Grounds raised (Be brief but specific):

21 a. Ineffective Assistance of Counsel

22 b. \_\_\_\_\_

23 c. \_\_\_\_\_

24 d. \_\_\_\_\_

25 Result: Denied Date of Result: 1/15/03

26 II. Name of Court: California Supreme Court

27 Type of Proceeding: Habeas Petition

28 Grounds raised (Be brief but specific):

ResultXXXXXXXXXXXXXXXXXXXXXXXDate of ResultXXXXXXXXXX

HH XXXX Name of Court XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXType of ProceedingXX

X. e. Ineffective assistance of counsel

b. \_\_\_\_\_

C. \_\_\_\_\_

d. \_\_\_\_\_

Result: Denied Date of Result: 6/28/06

IV. Name of Court: \_\_\_\_\_

Type of Proceeding: \_\_\_\_\_

Grounds raised (Be brief but specific):

a. \_\_\_\_\_

b. \_\_\_\_\_

C. \_\_\_\_\_

d. \_\_\_\_\_

Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes \_\_\_\_\_ No X

Name and location of court: \_\_\_\_\_

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent  
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,  
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: See "ATTACHMENT RE: SECTION B. GROUNDS FOR RELIEF"  
6 for all claims presented in this habeas petition.

7 Supporting Facts: \_\_\_\_\_

8 \_\_\_\_\_

9 \_\_\_\_\_

10 \_\_\_\_\_

11 Claim Two: \_\_\_\_\_

12 \_\_\_\_\_

13 Supporting Facts: \_\_\_\_\_

14 \_\_\_\_\_

15 \_\_\_\_\_

16 \_\_\_\_\_

17 Claim Three: \_\_\_\_\_

18 \_\_\_\_\_

19 Supporting Facts: \_\_\_\_\_

20 \_\_\_\_\_

21 \_\_\_\_\_

22 \_\_\_\_\_

23 If any of these grounds was not previously presented to any other court, state briefly which  
24 grounds were not presented and why:

25 \_\_\_\_\_

26 \_\_\_\_\_

27 \_\_\_\_\_

28 \_\_\_\_\_

1 List, by name and citation only, any cases that you think are close factually to yours so that they  
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning  
3 of these cases:

4 See "ATTACHMENT RE: SECTION B. GROUNDS FOR RELIEF" for all  
5 cases that are close factually to Petitioner's.

6  
7 Do you have an attorney for this petition? Yes X No       

8 If you do, give the name and address of your attorney: SCOTT L. TEDMON,  
9 717 K Street, Suite 227, Sacramento, CA 95814

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in  
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12  
13 Executed on

8/10/06

14 Date

  
15  
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Signature of Petitioner

(Rev. 6/02)



**ATTACHMENT RE: SECTION B. GROUNDS FOR RELIEF**

**I**

**STATEMENT OF THE CASE**

On August 4, 1997, a seven-count Information was filed by the Santa Clara County District Attorney charging petitioner Alvarez in Count One with a violation of Penal Code § 288.5(A), continuous sexual abuse; in Count Two with a violation of Penal Code § 269, aggravated sexual assault of a child in that there was a violation of Penal Code § 288a with a minor under 14 years of age; in Count Three with a violation of Penal Code § 288(B)(1), lewd and lascivious act upon a child by means of force; in Count Four with a violation of Penal Code § 273A(A), cause/permit pain and suffering or endanger/injure a child; in Count Five with a violation of Penal Code § 273D(A), inflicting corporal injury upon a child; in Count Six with a violation of Penal Code § 273D(A), inflicting corporal injury upon a child; and in Count Seven with a violation of Penal Code § 273A(A)(1), endangering the health of a child. The charging Information is attached hereto as Exhibit A.

The case proceeded to jury trial. On June 18, 1999, the jury rendered its verdict. Petitioner was acquitted of Counts One and Three. Petitioner was convicted as charged in Counts Two, Five and Six. Petitioner was convicted in Counts Four and Seven of the lesser included misdemeanor offense of Penal Code § 273a(b), cause/permit pain and suffering or endanger/injure a child.

On May 26, 2000, petitioner was sentenced to state prison for a term of 17 years to life.

On June 16, 2000, petitioner timely filed a notice of appeal. Petitioner filed both an appeal and a habeas petition with the Sixth District Court of Appeal. Petitioner's direct appeal and habeas petition were consolidated for hearing and decision by the Sixth District Court of Appeal.

On October 25, 2002, the Sixth District Court of Appeal affirmed petitioner's conviction and denied petitioner's habeas petition.

On December 3, 2002, petitioner filed a petition for review in the California Supreme Court alleging the conviction violated his federal constitutional rights as follows:

1. The evidence was legally insufficient to support that the molest was committed by means of "duress."

1           2. The trial court prejudicially erred in precluding the defense from exploring if  
2           Amanda had been molested by her natural father and had witnessed adult sexual  
3           activity.

4           3. The trial court prejudicially erred to petitioner's prejudice in excluding the  
5           negative results of petitioner's penile swab sample.

6           4. The trial court wrongly defined "duress" to include "hardship" to petitioner's  
7           prejudice.

8           5. Petitioner's sentence did not comply with California Penal Code § 654 and  
9           Apprendi v. New Jersey.

10          6. There were multiple instances of trial counsel's deficient representation which  
11          undermined confidence in the verdict.

12          On January 15, 2003, the California Supreme Court denied petitioner's petition for review.

13          On December 17, 2003, petitioner filed a habeas petition with the Santa Clara County  
14          Superior Court.

15          On January 14, 2004, the Santa Clara County Superior Court denied petitioner's habeas  
16          petition.

17          On March 11, 2005, petitioner filed a habeas petition with the Sixth District Court of Appeal.

18          On March 23, 2005, the Sixth District Court of Appeal denied petitioner's habeas petition,  
19          without comment.

20          On January 12, 2006, petitioner filed a habeas petition with the California Supreme Court  
21          alleging the conviction violated his federal constitutional rights as follows:

22               1. Violation by the prosecution of their discovery obligation under Brady;

23               2. Failure of the trial court to admit evidence of third party culpability;

24               3. Failure of the trial court on Count Two to instruct on the lesser included charge  
25               of non- forcible oral copulation;

26               4. Violation by the trial court regarding petitioner's right to be personally present at  
27               a critical stage of the proceeding. During jury deliberations the trial court answered  
28               questions posed by the jury without petitioner or his defense counsel being present

1 and without a stipulation from petitioner that the trial Court could answer jury  
2 questions without the presence of petitioner or his trial counsel.

3 5. Petitioner did not receive effective assistance of counsel as guaranteed by the Sixth  
4 Amendment.

5 On June 28, 2006, the California Supreme Court denied petitioner's habeas petition,  
6 commenting as follows: "(See *In re Clark* (1993) 5 Cal.4th 750.)"

## 7 II

### 8 STATEMENT OF FACTS

#### 9 A. PROSECUTION VERSION

10 Ruby Rubio was the mother of Amanda and Anthony. Ruby Rubio became acquainted with  
11 petitioner and sometimes allowed him to care for Amanda and Anthony. Petitioner occasionally kept  
12 Amanda and Anthony overnight. They either stayed at a friend's house or at a motel.

13 In November 1996, petitioner agreed to care for the children and ended up caring for them  
14 for several nights. When petitioner returned the children to Ruby, she noticed that Anthony's eyes  
15 were irritated. Anthony said that petitioner had put chili in his eyes. That evening, while Ruby  
16 bathed the children, she noticed bruises. When Ruby told Amanda to wash her private area,  
17 Amanda complained that it burned and irritated her. Amanda told Ruby that when petitioner gave  
18 her a bath or a shower, he sometimes stuck his finger inside her. Ruby called the police.

19 After talking to the children, the police officer left and Ruby got the children ready for bed.  
20 Ruby asked them why they had not previously told her what petitioner had done. Amanda said that  
21 she was scared. Amanda said that petitioner had warned her that if she told anyone about the  
22 spanking "or anything," it would be her fault if she and Anthony were taken away from their mother.  
23 Amanda told Ruby that here was something that she had not revealed, saying that petitioner had  
24 made her drink his "pee-pee milk." When Ruby did not understand, Amanda said, "you know, that  
25 it's the white stuff that comes out of his pee-pee."

26 Ruby again called the police. They arrived and spoke with the children. At around 2:00 or  
27 3:00 a.m., Amanda was examined at the Santa Clara Valley Medical Center. Amanda, who weighed  
28 56 pounds and was 47 inches tall, had bruises and abrasions on her face, legs, and the front area of

1 her body. According to the nurse practitioner who examined Amanda, these injuries were not  
2 consistent with normal childhood play. Amanda's genital examination was relatively normal.  
3 Anthony, who weighed 44 pounds and was 41 inches tall, was also examined. It was alleged  
4 Anthony had bruises and abrasions.

5 Amanda and Anthony were interviewed the next day, November 20, 1996. Amanda said that  
6 petitioner put chili in Anthony's eyes. Amanda said petitioner put his "pee-pee" in her mouth while  
7 she was lying down in petitioner's van, that "nasty milk" came out, and that she threw up because  
8 of the "nasty milk." Amanda said that petitioner became angry when she threw up. Amanda also  
9 said that petitioner had given her "milk" from his "pee-pee" before. Amanda said that on that same  
10 occasion, petitioner had touched his "pee-pee" to her "pee" and had touched her "pee" with his  
11 finger. Amanda said petitioner had threatened to hurt her and to hit her.

12 Anthony was interviewed. Anthony said that petitioner had put chili in Anthony's eyes,  
13 pretended to cut off his "pee-pee" with scissors, pulled his "pee-pee" back too much and had hit  
14 Anthony.

15 On December 5, 1996, Amanda returned to the hospital to have additional photographs taken.  
16 Ruby reported that Amanda had developed a vaginal discharge. The discharge was cultured and the  
17 results demonstrated that Amanda had chlamydia organism growing in her vagina. The November  
18 20, 1996 baseline culture had been negative. Based upon this information, and the known incubation  
19 period for chlamydia, the physician's assistant opined that Amanda had been infected seven to  
20 fourteen days before December 5, 1996, and less than three days before November 20, 1996.

21 At trial, Anthony testified that he was seven years old and in the first grade. Anthony told  
22 the jury that petitioner put chili in his eyes, and that petitioner had done that more than once.  
23 Anthony said that petitioner spanked Amanda with his shoe. Anthony also said that petitioner put  
24 chili on Anthony's penis.

25 Amanda testified that she was eight years old and in the third grade. Amanda said that  
26 petitioner had put his "private" into her mouth, and that something "like water" came out of  
27 petitioner's "private" and went into her mouth. Amanda said this happened several times and took  
28 place in petitioner's van and in the house. Amanda said that petitioner put his "private" near her

1 “private,” put his tongue on her “private,” and put his finger in her “private.” Amanda said that  
2 petitioner told her she would get into trouble if she told her mother.

3 **B. DEFENSE VERSION**

4 Petitioner testified and denied committing the charged crimes. Testifying about his activities  
5 the weekend before his arrest, petitioner stated that he has purchased some items at the grocery store,  
6 including fresh serrano chilis and green and yellow gummy worms. While he was driving in the van  
7 with the children, petitioner heard the grocery bag rustling. As they were preparing to go to lunch,  
8 petitioner discovered that Anthony had been hiding the chilis in his pocket. Inside the restaurant,  
9 Anthony kept rubbing his eyes and complaining of pain. Petitioner took Anthony to the restroom  
10 and splashed water into his eyes. Anthony continued to rub his eyes. Petitioner believed that the  
11 chilis had caused the problem with Anthony’s eyes.

12 Petitioner testified that Ruby had told him to use his belt to “whup their asses” if Amanda  
13 and Anthony got out of control. Petitioner used his belt to spank Amanda for spitting in her soup.  
14 Petitioner spanked Anthony twice that weekend for playing with scissors. Anthony was using  
15 scissors to cut threads from his jeans, and the petitioner said, “Do you want to cut yourself down  
16 there?”

17 Petitioner and the children spent Saturday night in the van. Petitioner said that there was an  
18 unrefrigerated carton of milk in the van. Petitioner testified that he and the children spent Sunday  
19 at his family’s flower shop. Anthony’s eyes were red and the skin had broken. Petitioner applied  
20 hydrogen peroxide under Anthony’s eyes, not realizing that hydrogen peroxide should not be used  
21 near the eyes. Anthony felt a stinging sensation and said, “Don’t put chili in my eyes.” Petitioner  
22 told Anthony it was not chili.

23 Petitioner spent Monday night with the children at a Motel 6. Petitioner delivered the  
24 children to Ruby at about 8:20 a.m. on Tuesday morning. Petitioner argued with Ruby, saying that  
25 he had been forced to miss a class because he had to care for Ruby’s children. Petitioner told Ruby  
26 that he spanked the children, that Anthony grabbed some chili and touched his eyes, and that  
27 Petitioner had tried to wash out Anthony’s eyes.

28 Fifteen hours after he dropped off the children, petitioner was arrested. According to

1 petitioner, he told the police that he had not molested Amanda, and had not put chilis in Anthony's  
2 eyes or on his penis. Petitioner said that while he was in jail he spoke with Ruby. When petitioner  
3 asked Ruby why she was making the accusations, Ruby responded, "You shouldn't have fucked with  
4 me, this is what you get for fucking with me."

5 Petitioner testified that he had never experienced symptoms of chlamydia. Petitioner  
6 normally had severe bronchitis once a year and that was sometimes treated with antibiotics. When  
7 arrested, police used a swab to wipe the outside of petitioner's penis. Petitioner independently took  
8 a test in which the inside of his urethra was tested.

9 Ramon Quintanilla testified that petitioner lived in his house while petitioner was going to  
10 school. Quintanilla said that petitioner brought Amanda and Anthony to the house every other  
11 weekend.

12 An employee of a restaurant testified that he recalled an occasion where one of the children  
13 with petitioner got something in his eye and was rubbing it and crying. The employee did not see  
14 how the irritant got in the child's eye.

15 Leslie Hernandez testified that she had helped petitioner watch the children during the  
16 weekend before petitioner's arrest.

17 Ejaz Anam testified that on the Monday before petitioner's arrest, Anam had loaned  
18 petitioner money to pay for a motel.

19 Dr. Amy Portmore, qualified as an expert in sexually transmitted disease, testified about  
20 chlamydia. Dr. Portmore stated that two categories of chlamydia were pertinent. These were (1)  
21 chlamydia trachomatis, which is a sexually transmitted disease; and (2) chlamydia pneumoniae,  
22 which is a respiratory infection that causes pneumonia and bronchitis. Dr. Portmore examined a  
23 blood analysis performed on petitioner for chlamydia. Based upon the results, Dr. Portmore  
24 surmised that petitioner had had chlamydia but could not say which type that petitioner had had. Dr.  
25 Portmore stated there was very little data on whether chlamydia could be transmitted by digital  
26 penetration but stated that such transmission was possible. Dr. Portmore estimated that the  
27 incubation period for chlamydia is one to three weeks for genital transmission.  
28



1 **C. STIPULATIONS/TRIAL COURT RECORD**

2 **Stipulations** - The parties stipulated that while petitioner was in jail he was seen by the jail  
3 medical staff nine times. The medical reports contain no indication that petitioner had physical  
4 symptoms of any kind. The parties also stipulated that the police seized various items from  
5 petitioner's van. These items included underwear and a sleeping bag which tested negative for the  
6 presence of semen.

7 **Trial Court Record** - The Reporter's Transcript is identified herein as "RT" and the  
8 Supplemental Reporter's Transcript as "Supp. RT." Both RT and Supp. RT are attached hereto in  
9 Exhibit B.

10 The Clerk's Transcript is identified herein as "CT", the Supplemental Clerk's Transcript 1  
11 as "Supp. CT 1" and the Supplemental Clerk's Transcript 2 as "Supp. CT 2." CT, Supp. CT 1 and  
12 Supp. CT 2 are attached hereto in Exhibit C.

13 **III**

14 **GROUND FOR RELIEF**

15 **GROUND ONE**

16 THE PROSECUTION VIOLATED BRADY BY: 1) FAILING TO DISCLOSE TO  
17 PETITIONER THAT THE ALLEGED VICTIM, AMANDA, WAS INFECTED  
18 WITH CHLAMYDIA UNTIL IT WAS TOO LATE TO EXCLUDE PETITIONER  
19 AS THE ALLEGED PERPETRATOR; 2) FAILING TO PROVIDE TO  
20 PETITIONER THE RESULTS OF THE TESTS CONDUCTED ON THE  
BLANKET FOUND IN PETITIONER'S VAN, AND; 3) FAILING TO DISCLOSE  
TO PETITIONER THAT RUBY RUBIO WAS UNDER INVESTIGATION FOR  
WELFARE FRAUD AND WAS CONVICTED OF WELFARE FRAUD AFTER  
THE VERDICT BUT BEFORE SENTENCING.

21 The United States Supreme Court held in Brady v. Maryland, 373 U.S. 83 (1963), that  
22 suppression of material evidence by the prosecution which is favorable to the defendant violates the  
23 right to due process guaranteed by the Fifth Amendment. Whether the prosecution acted in good  
24 faith or bad faith is immaterial to the inquiry under Brady. In subsequent cases, the U.S. Supreme  
25 Court has placed an ever-increasing duty upon the government to disclose favorable evidence to the  
26 defense. Pursuant to United States v. Agurs, 427 U.S. 97, 107, 110 (1976), the prosecution has a  
27 duty to disclose evidence favorable to the defense even if no such request was made by the  
28 defendant. Additionally, the Supreme Court in Agurs held that even an inadvertent failure by the

1 government to disclose material exculpatory evidence may constitute a violation of the defendant's  
2 Fifth Amendment right to due process under Brady.

3 In United States v. Bagley, 473 U.S. 667, 682 (1985), the Supreme Court addressed the issue  
4 of materiality when it stated, "if there is a reasonable probability that, had the evidence been  
5 disclosed to the defense, the result of the proceeding would have been different." The Court held  
6 that a reasonable probability is, "a probability sufficient to undermine confidence in the outcome."  
7 The high court further defined this issue in Kyles v. Whitley, 514 U.S. 419, 433-35 (1995) as  
8 follows, "the question is not whether the defendant would have more likely than not received a  
9 different verdict with the evidence, but whether in its absence he received a fair trial, understood as  
10 a trial resulting in a verdict worthy of confidence." (Emphasis added.)

11 The Ninth Circuit stated its position on the matter in Carriger v. Stewart, 132 F.3d 463, 479  
12 (9<sup>th</sup> Cir. 1997) when the court held, "A reasonable probability does not require showing by a  
13 preponderance of the evidence that the outcome would have been different."

14 In evaluating a Brady violation by the government, the critical point of analysis turns on  
15 whether such violation denied the defendant his Fifth Amendment right to due process right and a  
16 fair trial.

#### 17 BRADY VIOLATION NUMBER ONE

18 As stated previously, the government failed to disclose that the alleged victim, Amanda, was  
19 infected with chlamydia until it was too late for petitioner to be excluded as the alleged perpetrator.  
20 The record reveals the petitioner was tested for a sexually transmitted disease on June 18, 1997. The  
21 results revealed petitioner did not have chlamydia, which was the sexually transmitted disease that  
22 Amanda was found to have in a test administered in December of 1996. Relating the Supreme Court  
23 holding in Brady and its progeny to the case at bar, it would be wholly disingenuous for the  
24 government to argue that Amanda's physical condition in December of 1996 regarding her having  
25 a sexually transmitted disease was not material to the ultimate issue of guilt or innocence. Further,  
26 the government would know that a negative test result by petitioner for chlamydia administered  
27 during the same time frame as when Amanda was tested would be very powerful exculpatory  
28 evidence. However, the government did not disclose Amanda's positive test results to the defense



1 until months after the fact. As such, the government's failure to provide this critical evidence denied  
2 petitioner the opportunity to prove he did not have chlamydia at the time of the alleged criminal  
3 conduct. There could not have been a more material and exculpatory piece of evidence for petitioner  
4 to present to the jury at trial. The government's failure to disclose this critical evidence to petitioner  
5 in a timely manner not only violated their discovery obligation under Brady but in its' absence,  
6 undermined any confidence in the verdict thereby denying petitioner of his right to a fair trial.

7 BRADY VIOLATION NUMBER TWO

8 The record reveals that the red plaid blanket found in petitioner's van was seized by law  
9 enforcement at the time of arrest. However, from the point of seizure, the record is very convoluted  
10 and confusing. At trial, testimony was adduced that the blanket had not been tested for semen  
11 because it was mislabeled or misplaced. However, this testimony runs contrary to how the blanket  
12 was handled when reviewing its' chain-of-evidence. Attached hereto as Exhibit D is the declaration  
13 of Frank Saunders. As of the date of his declaration in 2005, Mr. Saunders either served in law  
14 enforcement or dealt with law enforcement matters for some 40 years. Over that period of time, Mr.  
15 Saunders qualified as an expert witness well in excess of some 400 cases. In his review of the  
16 petitioner's case, Mr. Saunders states in paragraph 7 of his declaration that, "dating back to 1965,  
17 it is at this time my firm professional opinion that I can never recall a more confusing and convoluted  
18 "chain-of-evidence" series of violations, then is clearly demonstrated during this specific instance  
19 presently under review."

20 Mr. Saunders observes that according to the San Jose PD evidence log, on March 28, 1997,  
21 the red plaid blanket was released by San Jose PD to the Santa Clara County Crime Laboratory for  
22 supposed testing along with other evidentiary items relevant to petitioner's case. However, there is  
23 no indication of the result of any such testing of the blanket in the April 15, 1997 crime lab report  
24 of criminalist Kathy Benjamin. Mr. Saunders notes that approximately two months later, specifically  
25 June 10, 1998, the blanket was sent from San Jose PD to the Sexual Assault Investigation Unit  
26 (SAIU), where it stayed for one day. The San Jose PD records reflect the blanket was logged back  
27 into the San Jose PD property room the next day, that being June 11, 1998.

28 It is undisputed in the record that the San Jose PD released the red plaid blanket to not one,

1 but two different investigative agencies. It defies logic to believe that the blanket was not tested by  
2 the Santa Clara County Crime Lab and/or by SAIU. If the blanket was tested, as petitioner believes,  
3 the government's failure to disclose the results constitutes a clear violation of Brady. If the test  
4 result of the blanket was negative for petitioner's semen, that result would have served to materially  
5 corroborate petitioner's claim of innocence. This is especially true given the fact that when the  
6 government tested petitioner's underwear and sleeping bag, which were seized from his van along  
7 with the blanket, the results came back negative for the presence of semen.

8 The government's failure to produce the test results of the red plaid blanket to the defense  
9 violated the mandate of Brady and served to further undermine any confidence in the jury's verdict.

10 BRADY VIOLATION NUMBER THREE

11 Ruby Rubio, who is the mother of Amanda and Anthony, was a key witness in the  
12 government's case. During the pendency of petitioner's case at the trial court level, the government  
13 failed to disclose to the defense that Ruby Rubio was under a current investigation for welfare fraud.  
14 In point of fact, Ruby Rubio was convicted of welfare fraud approximately one month after  
15 petitioner's verdict but prior to his sentencing and motion for a new trial. In January of 2002, some  
16 two and one-half years after the verdict, petitioner's state court appellate counsel discovered that  
17 Ruby Rubio was convicted of welfare fraud during the time period when petitioner's case was still  
18 being litigated at the trial court level.

19 As set forth previously, the government has an affirmative duty under Brady to disclose  
20 exculpatory evidence to the defense. In the case at bar, Ruby Rubio, a key witness for the  
21 government, was under investigation for a crime of moral turpitude, i.e. welfare fraud, during the  
22 same time period that petitioner was being prosecuted. Pursuant to Brady, the government had an  
23 affirmative duty to disclose this critically important and materially relevant Ruby Rubio  
24 impeachment information to the defense.

25 Beyond their Brady disclosure requirements, the government has an additional affirmative  
26 duty to disclose any favored treatment or potential benefits rendered by the government to any of  
27 their witness under Giglio v. U.S., 405 U.S. 150 (1972). If Ruby Rubio anticipated receiving or in  
28 fact did receive any benefit in her welfare fraud case as a result of cooperating with the government

1 in petitioner's case, the government had a duty to disclose those facts. On this Giglio issue,  
2 petitioner will be moving this Court under Federal Rules of Civil Procedure Rule 7, to expand the  
3 record to determine what benefit, if any, that Ruby Rubio received in her welfare fraud case as a  
4 result of her cooperation with the government in petitioner's case.

#### 5 CONCLUSION RE: BRADY VIOLATIONS

6 Each of the Brady violations enumerated above are significant in nature, probative on the  
7 issue of guilt or innocence, and material to the outcome such that petitioner was prejudiced by the  
8 government's failure to disclose this information. Had this information been disclosed to the  
9 defense, there is more than a reasonable probability the result of the trial would have been different.  
10 See Strickler v. Green, 527 U.S. 263, 281 (1999). The government's failure to produce exculpatory  
11 Brady material to the defense in a timely manner served to defeat petitioner's right to fair trial and  
12 undermines any confidence in the verdict. Based on the foregoing Brady analysis, petitioner's  
13 conviction must be reversed.

#### 14 GROUND TWO

15 COUNT TWO MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED  
16 IN PRECLUDING PETITIONER FROM EXPLORING IF AMANDA HAD BEEN,  
17 1) MOLESTED BY HER NATURAL FATHER TO ESTABLISH AN  
18 ALTERNATIVE SOURCE FOR AMANDA'S CHLAMYDIA AND; 2) THAT SHE  
19 HAD WITNESSED ADULT SEXUAL ACTIVITY THEREBY OBTAINING HER  
20 SEXUAL KNOWLEDGE.

21 Pursuant to the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, a  
22 defendant is entitled to due process, compulsory process and confrontation and cross-examination  
23 of accusing witnesses. See Brecht v. Abrahamson 507 U.S. 619 (1993); and Washington v. Texas,  
24 388 U.S. 14, 19 (1967). At trial, petitioner sought to cross-examine Amanda if she had ever told  
25 petitioner that Ivan Acosta, Amanda's natural father, had molested her. The prosecution objected.  
26 After an unreported sidebar conference, defense counsel moved to a different topic of questioning.

27 Subsequently, the defense filed a motion under California Evidence Code § 782 requesting  
28 permission to question Amanda about her prior molest and her having observed her parents having  
sex. Trial counsel's Evidence Code § 782 motion is attached hereto as Exhibit E. See also Exhibit  
C - CT 206-212. Given that § 782 applies in child molest cases, the defense motion correctly stated

1 the offer of proof of Amanda's "prior sexual contact is relevant and material to the determination  
2 of the credibility of the complaining witness." A further point of significance for the defense was  
3 to establish an alternative sexual contact from that of petitioner as a source of Amanda contracting  
4 chlamydia. Finally, this evidence of an alternative sexual contact would serve to explain Amanda's  
5 sexual knowledge. The trial court denied the motion without a hearing stating the defense motion  
6 was untimely as Amanda was off the stand and it lacked merit.

7 Later in the trial, the court held a hearing outside the jury's presence wherein Ruby Rubio  
8 was questioned about the same matters specifically, her knowledge of Amanda being molested on  
9 a prior occasion as well as Amanda having observed her parents having sex. At the hearing, Rubio  
10 denied such knowledge. Rather than allowing the jury to hear both petitioner and Rubio's testimony  
11 on the matter, the trial court denied the defense's § 782 motion.

12 Federal constitutional law mandates that a defendant be given the right to effectively cross-  
13 examine his accuser. In the case at bar, the defense had a legitimate right to question Amanda on  
14 her past sexual conduct and knowledge. This is particularly true given the fact that the case turned  
15 on the credibility of Amanda versus that of the petitioner. The case of People v. Daggett 225  
16 Cal.App.3d 751, 757 (1990) held that a prior molest was relevant in casting doubt on the credibility  
17 of the complaining witness's accusations as follows: "A child's testimony in a molestation case  
18 involving oral copulation and sodomy can be given an aura of veracity by his accurate description  
19 of the acts. This is because knowledge of such acts may be unexpected in a child who had not been  
20 subject to them. **In such a case it is relevant for the defendant to show that the complaining**  
21 **witness had been subjected to similar acts by others in order to cast doubt upon the conclusion**  
22 **that the child must have learned these acts through the defendant."** (Emphasis added.)

23 At trial, the government itself argued that children frequently do not disclose all the first time  
24 they describe sexual contact out of fear and/or embarrassment. (Exhibit B - RT 717, 736.) There  
25 is every reason to believe that Amanda's statement to petitioner regarding her past sexual contacts  
26 and observations of her parents sexual activities was only the starting point for more significant and  
27 relevant facts to be produced upon examination of Amanda. The trial court's denial of such an  
28 examination violated petitioner's federal rights to due process, confrontation and a fair trial. As

1 such, petitioner's conviction must be reversed.

2 **GROUND THREE**

3 THE TRIAL COURT PREJUDICIALLY ERRED IN EXCLUDING EVIDENCE OF  
4 PETITIONER'S NEGATIVE PENILE SWAB CULTURE TEST FOR  
5 CHLAMYDIA.

6 Pursuant to the Fifth and Fourteenth Amendments, the defendant in a criminal case has a  
7 fundamental right to introduce evidence in his defense. See Taylor v. Illinois, 484 U.S. 400 (1988)  
8 and Chambers v. Mississippi, 410 U.S. 284 (1973). In this case, the only physical evidence produced  
9 at trial was Amanda's chlamydia infection and was linked to petitioner only through Amanda's  
10 identification of him. At trial, petitioner contested the chlamydia evidence by presenting the  
11 testimony of Dr. Portmore, who stated it was impossible to determine from sophisticated blood  
12 analysis that petitioner ever had the disease (Exhibit B - RT 752-759) and evidence that petitioner  
13 never experienced symptoms while in custody. (Exhibit B - RT 678-679.)

14 While Dr. Portmore's testimony was important on the issue of chlamydia, there was a  
15 separate and critical set of facts that petitioner attempted to introduce at trial to establish his  
16 innocence. On or after June 6, 1997 and prior to trial, petitioner learned from the prosecution that  
17 Amanda had contracted chlamydia trachomatis. Soon after obtaining this information, petitioner  
18 took a penile swab exam on June 16, 1997 in order to detect if he had the disease. The results of  
19 petitioner's test were negative. In order to further prove his innocence of the charges, petitioner  
20 sought to introduce the fact that he took a penile swab exam on June 16, 1997 to detect if he had  
21 chlamydia and the results were negative. The trial court ruled the negative results of petitioner's  
22 penile swab exam be excluded as evidence for the jury's consideration. The trial court's exclusion  
23 of this evidence was fundamentally unfair, prejudiced petitioner's case and violated his federal  
24 constitutional right to introduce evidence in his defense. This violation of petitioner's right to due  
25 process and a fair trial mandates a reversal of his conviction.

26 **GROUND FOUR**

27 PETITIONER'S CONVICTION ON COUNT TWO MUST BE REVERSED SINCE  
28 THE JURY WAS ERRONEOUSLY INSTRUCTED THAT "DURESS" INCLUDES  
"HARDSHIP."

A defendant's Fifth Amendment right to due process at trial includes the critically important



1 standard of having the jury properly instructed on every essential element of the crime charged. See  
2 Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Sullivan v. Louisiana, 508 U.S. 275, 277-278  
3 (1993); Griffin v. U.S., 502 U.S. 46, 59 (1991); and Keating v. Hood, 191 F.3d 1053, 1062-1063 (9<sup>th</sup>  
4 Cir. 1999). In petitioner's case, the trial judge committed clear and prejudicial instructional error.  
5 As to Count Two, aggravated sexual assault, the trial judge instructed the jury with CALJIC No.  
6 10.55, which did not define duress. CALJIC No. 10.42 was used by the trial court to instruct the jury  
7 on Count Three, lewd and lascivious conduct upon a child under 14 by means of force, violence,  
8 duress, etc. These two jury instructions are attached hereto in Exhibit F. CALJIC No. 10.42  
9 contained a definition for duress and stated that duress could be proved, inter alia, by a "direct or  
10 implied threat of hardship . . . ." (Emphasis added.) (Exhibit C - CT 273-274; Exhibit B - RT 700.)  
11 While this instruction pertained to an alternative charge for Count Two, that being lewd and  
12 lascivious conduct as alleged in Count Three, no other definition of duress was given. By virtue of  
13 the manner in which the trial court instructed the jury, the jurors would have considered CALJIC No.  
14 10.42's definition with respect to Count Two in that the jury was informed that Counts One, Two and  
15 Three were alternative charges for the same criminal conduct. Further to the point and importantly,  
16 the jury was instructed that it could convict petitioner of no more than one of these offenses, those  
17 being Count One, Two or Three.

18 The trial court's instruction of "hardship" being included in the jury's consideration of the  
19 element of "duress" violated both legislative and judicial dicta. In 1990, the California Legislature  
20 enacted a definition of "duress" for rape which included the threat of "hardship." See Penal Code  
21 § 261(b), §262(c); Stats. 1990, ch. 630, §pp.2701-2702. In 1993, the Legislature deleted "hardship"  
22 from the definition. See Stats. 1993, ch. 595, §1, pp. 2575-2577. Given this change, the appellate  
23 court in People v. Valentine, 93 Cal.App. 4<sup>th</sup> 1241, 1247-1254 (2001) held that the inclusion of  
24 "hardship" within the definition of "duress" was error given the substantial changes to the law of  
25 rape, which is closely related to the major sex crime of oral copulation by means of force, violence,  
26 duress, etc.

27 This instructional error was highly relevant to the jury's deliberations as the government  
28 pointedly argued hardship. Specifically, the prosecutor argued to the jury that Amanda was

powerless to do anything other than to obey petitioner since, as a young child, she would otherwise have endured the hardship of being stranded as follows, "What is she supposed to do, hitchhike home? She is far from home. She is with this guy and her options are none." (Exhibit B - RT 722.) The fact is that the trial court's instructional error was prejudicial to petitioner as the government was able to secure a conviction pursuant to an erroneous legal theory for an offense that does not exist under California state law. Such an egregious error violates petitioner's Fifth Amendment right to due process and Sixth Amendment right to a fair trial. Based on this substantive constitutional violation, petitioner's conviction must be reversed.

#### GROUND FIVE

#### THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF NON-FORCIBLE ORAL COPULATION VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS

Petitioner was charged in Count Two with a violation of Penal Code § 269. Pursuant to Penal Code § 269, if the alleged act is an oral copulation of a child under the age of fourteen years, which is a violation of Penal Code § 288a(c)(1), the oral copulation must be forceful. Non-forcible oral copulation is a lesser included offense to a violation of Penal Code § 269. The jury was not instructed on this lesser included offense.

While petitioner's trial counsel did not request this lesser included instruction, the trial court should have instructed the jury on this lesser included offense, sua sponte. Pursuant to both federal and state law, the trial court has a sua sponte duty to instruct on a lesser included offense.

The U.S. Supreme Court announced in Mathews v. United States, 485 U.S. 58, 63 (1988) that, "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. A parallel rule has been applied in the context of a lesser included offense instruction." In Beck v. Alabama, 447 U.S. 625 (1980), the U.S. Supreme Court reversed a murder conviction stating, "When the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense, but leaves doubt with respect to an element that would justify conviction of a capital offense the failure to give the jury the third option of convicting on a lesser included offense would seem inevitable to enhance the risk of an unwarranted conviction." The Court in Beck supported its' decision by citing the Supreme

1 Court case of Keeble v. U.S., 412 U.S. 205 (1977), where the Court stated that failure to instruct on  
 2 a lesser charge, "would raise difficult constitutional questions." A review of California case law  
 3 reveals parallel decisions as to the trial court's duty to instruct on lesser included charges, sua  
 4 sponte.. See People v. Hardy, 2 Cal.4th 86, 184 (1992); People v. Clark, 50 Cal.3d 583, 636 (1990);  
 5 People v. Lagunas, 8 Cal.4th 1030, 1034 (1994); People v. Russell, 45 Cal.App. 4<sup>th</sup> 1083, 1088  
 6 (1996); and People v. Breverman, 19 Cal. 4<sup>th</sup> 142 (1998).

7 In petitioner's case as to Count Two, the trial court had a duty, sua sponte, to instruct on the  
 8 lesser included offense of non-forcible oral copulation. The trial court's failure to do so was error  
 9 and had a substantial and injurious effect on the trial thereby violating petitioner's Fifth Amendment  
 10 right to due process. This is particularly true given that the jury acquitted petitioner of Count One,  
 11 which alleged a violation of Penal Code § 288.5, a charge which was predicated on a finding there  
 12 was forcible oral copulation, which the jury did not find true. Based on the trial court's instructional  
 13 error, petitioner's conviction must be reversed.

#### 14 GROUND SIX

#### 15 THE TRIAL COURT'S ANSWERING OF QUESTIONS FROM THE JURY 16 WITHOUT HAVING DEFENSE COUNSEL OR PETITIONER PRESENT 17 VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE 18 PROCESS.

19 A fundamental tenant of our criminal jury trial system is that a defendant has an absolute  
 20 right to be present at every critical stage of the proceedings. The Confrontation Clause of the Sixth  
 21 Amendment and the due process clause of the Fifth Amendment and Fourteenth Amendment are the  
 22 foundations for this right. In addressing this right, the U.S. Supreme Court in Illinois v. Allen, 397  
 23 U.S. 337, 338 (1970) held that a defendant charged with a felony has the fundamental right to be  
 24 present at every stage of the trial. See also United States v. Gagnon, 470 U.S. 522, 526 (1985).

25 In California, Penal Code § 1138 codifies the defendant's federal constitutional rights  
 26 regarding jury deliberation by setting forth the legal requirement as follows: "After the jury have  
 27 retired for deliberation,...if they desire to be informed on any point of law arising in the case,...the  
 28 information required must be given in the present of, or after notice to, the prosecuting attorney, and  
 the defendant or his counsel."



1 A review of the clerk's transcripts shows that the jury provided several written questions for  
 2 the trial court's consideration. These jury questions and the Court's corresponding answers are  
 3 attached hereto as Exhibit G. Four of these jury questions, specifically questions 3, 4, 5 and 7  
 4 pertained to the elements of the various charges. Further, the clerk's transcript, as contained in  
 5 Exhibit G, contains no record or reference that defense counsel was advised of the questions, or that  
 6 trial counsel and/or petitioner were present when the court answered the jury questions. If called to  
 7 testify, petitioner would state that he was present on one occasion, relating to one question, when the  
 8 court answered the jurors questions. As such, petitioner's federal due process right to be present at  
 9 every critical stage of the proceeding was violated. Based on the trial court's violation of petitioner's  
 10 fundamental constitutional right as enumerated above, petitioner's conviction must be reversed.

#### 11 GROUND SEVEN

#### 12 PETITIONER'S CONVICTION ON COUNT TWO MUST BE REVERSED DUE 13 TO LEGAL INSUFFICIENCY OF THE EVIDENCE THAT PETITIONER COMMITTED ORAL COPULATION BY MEANS OF DURESS.

14 It is well-established that a criminal conviction based on evidence which is inadequate to  
 15 persuade a rational trier of fact of the existence of each element necessary to support the conviction  
 16 violates the defendant's Fifth Amendment right to due process. See Jackson v. Virginia, 443 U.S.  
 17 307, 319 (1979). In the case at bar, petitioner's Fifth Amendment right to due process was violated  
 18 because the evidence produced at trial was legally insufficient to persuade a rational trier of fact that  
 19 he committed the oral copulation by means of "force, violence, duress, menace, or fear of immediate  
 20 and unlawful bodily injury on the victim or another person," which is an essential element for  
 21 conviction of Penal Code § 269, subd.(a)(4), § 288a, as alleged in Count Two. The jury instruction  
 22 on Count Two is attached hereto as Exhibit H.

23 At trial and on appeal, the government's sole theory was that petitioner committed the sexual  
 24 act by means of duress. At petitioner's trial, duress was defined as a "direct or implied threat of  
 25 force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary  
 26 susceptibilities to (1) perform an act which otherwise would not have been performed or, (2)  
 27 acquiesce in an act to which one otherwise would not have submitted." (Exhibit H.) See People v.  
 28 Pitmon, 170 Cal.App.3d 38, 50 (1985). Regarding this issue, petitioner acknowledges that evidence

1 was presented at trial from which a rational trier of fact could infer the existence of an implied threat  
2 which communicated a message to Amanda that her resistance would be futile as follows:

- 3 1. Petitioner spanked Amanda.
- 4 2. Petitioner engaged in other sex acts with Amanda besides the oral  
5 copulation for which he was convicted.
- 6 3. Petitioner told Amanda not to tell her mother or she would be taken  
7 from her custody.

8 However, there is a significant problem with the government's proof at trial. As to each of  
9 the implied threats petitioner allegedly made, there was a complete absence of evidence  
10 demonstrating that any of these implied threats **preceded** the oral copulation which formed the basis  
11 of petitioner's conviction. A review of the record reveals the following testimony.

12 Petitioner babysat Amanda for a long weekend. At its conclusion, Amanda accused  
13 petitioner of making her drink his "pee-pee" milk in his van (Exhibit B - RT 116-118, 121-122) and  
14 engaging in other sex acts. (Exhibit B - RT 122, 125, 124-126; Exhibit C - Supp.CT 1: 17, 20-23.)  
15 Amanda could not state if the sex acts occurred on different occasions or if they all occurred during  
16 a single encounter. (Exhibit B - RT 127.)

17 Although petitioner spanked Amanda during the weekend, the only evidence about when he  
18 did so was that it was on either Saturday or Sunday (Exhibit B - RT 507-509, 517, 584-585; Exhibit  
19 C - Supp. CT 1: 96). This nondescript type of evidence is clearly too vague in nature to warrant an  
20 inference that petitioner applied physical force to Amanda **before** the oral copulation or, indeed,  
21 **before** any of the sex acts she described. Likewise, there is no way to rationally determine that  
22 petitioner's directive not to tell occurred **before** the oral copulation or any of the other alleged sex  
23 acts.

24 As a common sense matter, in order for a direct or implied threat to have any effect on  
25 someone's decision-making ability and thus carry probative value, the threat must **precede** the illegal  
26 conduct for which the victim was coerced under duress. From a legal perspective, California  
27 appellate law has similarly held that the threat must precede the commission of the act. See People  
28 v. Bergschnieder, 211 Cal.App.3d 144, 154, fn. 8 (1989); People v. Hecker, 219 Cal.App.3d 1238

(1990); People v. Reyes, 153 Cal.App.3d 803, 811 (1984); People v. Young, 190 Cal.App.3d 248, 259 (1987); and People v. Pitmon, 170 Cal.App.3d 38, 51 (1985).

As stated previously, the government in this case did not specifically establish that the implied threats testified to by Amanda **preceded** the oral copulation charged in Count Two. It is important to note that California case law has consistently held that speculative inferences cannot pass for substantial evidence. See People v. Rayley, 2 Cal.4th 870, 890 (1992); People v. Morris, 46 Cal.3d 1, 21 (1988); and People v. Redmond, 71 Cal.2d 745, 755 (1969).

The record in this case clearly demonstrates that petitioner was denied his Fifth Amendment right to due process in that the evidence produced at trial was inadequate for a rational trier of fact to support the element of duress necessary to convict petitioner of Count Two. This is a critical issue as the prejudice to petitioner that stems from this due process violation is extremely significant. Specifically, pursuant to Penal Code § 269, § 288a, but for the jury's finding that petitioner committed oral copulation by means of duress, petitioner would not be serving a term of life imprisonment.

Based on the foregoing, petitioner's conviction must be reversed.

#### **GROUND EIGHT**

PETITIONER'S CONCURRENT TERMS FOR COUNTS FOUR AND SEVEN MUST BE STAYED UNDER PENAL CODE § 654 AND APPENDI.

California Penal Code § 654 specifically prohibits multiple punishments, including the imposition of concurrent terms, for a single act and for multiple acts based on an indivisible course of conduct committed pursuant to a single objective. See People v. Pearson, 42 Cal.3d 351, 359, 361-362 (1986) and People v. Harrison, 48 Cal.3d 321, 335 (1989). In the case at bar, the trial court imposed concurrent terms for petitioner's convictions regarding Anthony in Count Six, felony child beating pursuant to Penal Code § 273d(a) and Count Seven, misdemeanor child abuse pursuant to Penal Code § 273a(b). Petitioner contends the trial court erred as it failed to identify two distinct objectives underlying these acts. Petitioner argues the acts for which he was found guilty were ostensibly committed pursuant to a single objective, i.e. harming Anthony.

With respect to Amanda, petitioner contends the consecutive and concurrent terms for Count

Two, aggravated sexual assault based on oral copulation pursuant to Penal Code § 269, § 288a; Count Five, felony child beating pursuant to Penal Code § 273d(a); and Count Four, misdemeanor child abuse pursuant to Penal Code § 273a(b) were imposed in violation of Apprendi v. New Jersey 530 U.S. 466, 476-490 (2000). The U.S. Supreme Court in Apprendi held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be formally charged, submitted to the factfinder, treated a criminal element, and proven beyond a reasonable doubt.

In petitioner's case, it is unclear whether the conviction on Count Four rests upon a molest other than oral copulation. Count Four could have been based on petitioner hitting Amanda with a shoe, in which case it would be part of an indivisible course of conduct committed pursuant to a single objective with Count Five, i.e. infliction of physical harm. See People v. Loflink, 206 Cal.App. 3d 161, 166-168 (1988) for the proposition that multiple punishment for Penal Code § 273a and 273d convictions during a single course of conduct is impermissible. Count Four could have also been based on the overall inadequate care petitioner provided Amanda the babysitting weekend, in which case it would be part of an indivisible course of conduct along with Count Two in that both resulted in mental suffering. See People v. Thompson, 50 Cal.3d 134, 173 (1990) where the court held a defendant may not be punished for both lewd conduct with a minor and child abuse based on the same course of conduct.

Pursuant to Apprendi, petitioner's jury should have determined if Count Four was part of a continuous course of conduct committed pursuant to a single objective, along with Count Two, Count Five or both. The trial court's failure to have petitioner's jury make such a decision violated his Fifth Amendment right to due process. As such, this Court must vacate petitioner's sentence and remand it to the trial court for a jury determination.

## **GROUND NINE**

IN MULTIPLE INSTANCES, TRIAL COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION OF PETITIONER WHICH SERVED TO UNDERMINE CONFIDENCE IN THE VERDICT.

### **I. INTRODUCTION**

The legal standard regarding counsel's obligation to defend a client charged with a serious crime is well-established. In preparing and presenting a defense, a criminal defense attorney must

perform several separate, but interrelated tasks. In the benchmark case of Strickland v. Washington, 466 U.S. 668, 686 (1984), the United States Supreme Court held that a person's right to counsel in a criminal case must produce **effective assistance**, "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's role that is critical to the ability of the adversary system to produce just results."

In a pre-Strickland case, the United States Supreme Court held in Cuyler v. Sullivan, 466 U.S. 335 (1980) that a defendant is entitled to the reasonably competent assistance of an attorney acting as his loyal, diligent and conscientious advocate. In all cases dealing with the issue ineffective assistance of counsel, the penultimate function of the Sixth Amendment is to guarantee and protect the accused's fundamental right to a trial that is both fair in its conduct and reliable in its result.

In petitioner's case, trial counsel's pre-trial and trial representation fell substantially below any reasonable standard of competent representation. Further, and as will be clearly demonstrated herein, trial counsel's performance was objectively deficient, such that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the petitioner's case would have been different. Strickland, supra, at pages 687-688; Woodford v. Visciotti, 537 U.S. 19 (2002). The United States Supreme Court pronounced in Strickland that when trial counsel's ineffectiveness so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result, the conviction must be reversed. This is precisely what occurred in petitioner's case and as such, petitioner's conviction must likewise be reversed.

1. DEFENSE COUNSEL FAILED TO INVESTIGATE  
AND PRESENT EVIDENCE OF RUBY RUBIO'S  
WELFARE FRAUD.

Before counsel can make an informed strategy decision as to what evidence to ultimately present at trial, counsel must conduct a reasonable investigation. "At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balcom, 684 F.2d 794, 805 (11<sup>th</sup> Cir. 1982) *cert. denied* 460 U.S. 1098 (1983); Rummel v. Estelle, 590 F.2d 103, 104 (5<sup>th</sup> Cir. 1979). As the Court recognized in Strickland v. Washington, counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to



1 represent his client. "Counsel has a duty to make reasonable investigations or make a reasonable  
2 decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. The right  
3 to reasonably competent counsel imposes a correlative duty on defense counsel to undertake  
4 reasonable steps to investigate all avenues of defense. Wood v. Zahradnick, 578 F.2d 980, 982 (4<sup>th</sup>  
5 Cir. 1978). This principle is so fundamental that the failure to conduct reasonable pretrial  
6 investigation may in itself amount to ineffective assistance of counsel. United States v. Tucker, 716  
7 F.2d 576, 594 (9th Cir. 1983); citing McCain v. Swenson, 498 F.2d 207, 217-218 (8<sup>th</sup> Cir. 1974).  
8 A review of the record in this case reveals that petitioner's trial counsel was unprepared on all  
9 multitude of levels to present an adequate and meaningful defense to the charges brought by the  
10 government.

11 In preparing for trial, petitioner's trial counsel knew that a key witness for the government  
12 was the mother of Amanda and Anthony, Ruby Rubio. Specifically, Rubio stated that the children's  
13 accusations against petitioner first came to the surface during bath and bed time, at time at which  
14 they would be more apt to confide in their mother. (Exhibit C - CT 6-8, 10, 20, 23-26; Exhibit B -  
15 RT 222-229, 235-238.) Rubio also testified that Amanda made "fresh complaints" to her when she  
16 demonstrated with Barbie and Ken dolls the lewd conduct to which petitioner subjected her.  
17 (Exhibit B - RT 240-241.)

18 A key part of petitioner's defense necessitated a full impeachment of Ruby Rubio's  
19 credibility. At trial, in an effort to counter Rubio's testimony, petitioner's trial counsel suggested  
20 that Rubio influenced Amanda and Anthony to fabricate their accusations in order to cast Rubio in  
21 a mean and vindictive light. (Exhibit B - 6/9/99 Supp. RT 9-11; RT 536-537, 644, 646-648, 650-  
22 652, 654.) The defense presented evidence that when petitioner asked her why she had brought the  
23 charges against him in a three-way phone call involving Ejaz Anam, Rubio stated that was what  
24 petitioner got for "messaging" with her and said, "you should not have fucked with me." In short,  
25 defense counsel attempted to portray Ruby Rubio as an unfit mother who harbored animosity against  
26 petitioner, thereby hoping to create reasonable doubt about the source and veracity of Rubio's  
27 children's accusations against petitioner.

28 While this effort to impeach Rubio was appropriate, defense counsel did nothing to

1 independently investigate the critical fact that Rubio had engaged in welfare fraud despite the fact  
2 that petitioner advised defense counsel **prior to trial** that he suspected Rubio of committing welfare  
3 fraud. Defense counsel merely relied on the government's duty to run a criminal records check on  
4 their witnesses and then disclose material impeaching their witnesses. While the government  
5 informed defense counsel there was no such information to disclose, the government's disclosure  
6 did not include or contemplate any on-going welfare fraud investigation of Rubio.

7 In California, the Supreme Court in People v. Wheeler, 4 Cal.4th 284 (1992) held that where  
8 there is evidence that a witness has engaged in conduct involving "moral turpitude," it is admissible  
9 for impeachment purposes, subject to discretionary exclusion under California Evidence Code 352,  
10 even though it has not actually resulted in an actual criminal conviction. After being advised by  
11 petitioner of Rubio's welfare fraud problems, defense counsel had an affirmative duty to subpoena  
12 Rubio's welfare files. Ruby Rubio's relevant welfare-related documents are attached hereto as  
13 Exhibit I, containing pages numbered and circled as 12 through 64. As part of petitioner's Fifth  
14 Amendment right to due process, the trial court must review Rubio's welfare files in camera and then  
15 release to the defense any discovered material relevant to the impeachment of Rubio. Importantly,  
16 Rubio's moral turpitude conduct was documented in Rubio's welfare file **prior** to trial. Welfare  
17 authorities determined that Rubio underreported her earning under oath despite being repeatedly told  
18 she had to report any and all earnings before receiving welfare aid. Rubio's underreporting resulted  
19 in thousands of dollars of overpayment to her. (Exhibit I, pp. 37-64.)

20 Had defense counsel acted competently, this relevant evidence would have been admitted to  
21 show that Rubio had engaged in conduct amounting to welfare fraud and perjury **prior** to testifying  
22 at petitioner's trial.<sup>1</sup> Petitioner was severely harmed by counsel's ineffectiveness. Rubio was a key  
23 witness and the government's case rested in no small part on her credibility. Without Rubio, the jury  
24 would have certainly questioned whether Amanda's claims of molest by petitioner were the product  
25 of fantasy and/or coaching by Rubio. The government emphasized that Rubio corroborated Amanda  
26

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27 <sup>1</sup> At a minimum, the trial court would have entered an "adverse order" jury instruction  
28 concerning the assessment of Rubio's credibility. (Evid. Code Section 1042.)

1 and pointed out there was no reason to believe Rubio had coached her children to frame petitioner.  
2 However, had defense counsel acted competently, the defense would have presented welfare fraud  
3 evidence to show that Rubio had no problem committing perjury to advance her own interests. This  
4 Rubio "perjury evidence" would have served to significantly undermine the government's case by  
5 stripping Amanda's testimony of necessary corroboration. As importantly, this Rubio "perjury  
6 testimony" would have served to support petitioner's claim that the charges against him had been  
7 orchestrated by Ruby Rubio, who is nothing more than a self-interested and self-serving perjurer.  
8 It is probative to note that shortly after petitioner was convicted, Rubio was confronted regarding her  
9 welfare fraud and confessed. (Exh. I, pp 29-33.) Rubio was subsequently convicted of welfare  
10 fraud.

11 Defense counsel's failure to independently investigate Rubio's background for conduct  
12 involving moral turpitude and utilizing it for impeachment purposes at trial fell below the objective  
13 standard of reasonable professional conduct required under Strickland and mandates a reversal of  
14 his conviction.

15 2. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE BY  
16 FAILING TO INVESTIGATE, PREPARE WITNESSES AND  
PRESENT EXCULPATORY EVIDENCE AT TRIAL

17 In addition to the welfare fraud evidence that defense counsel failed to investigate and present  
18 regarding Ruby Rubio, counsel also failed to present evidence that Rubio abandoned Amanda and  
19 Anthony on many occasions, leaving petitioner to solely care for them. See the declaration of Ejaz  
20 Anam, which is attached hereto as Exhibit J. Mr. Anam's testimony, if presented at trial as set forth  
21 in his declaration, would have supported petitioner's contention that Rubio was an unfit, vindictive  
22 mother who simply turned on petitioner and used the children as her vehicle for retribution.  
23 Additionally, Anam's testimony would have shown petitioner to possess a genuine caring influence  
24 in Amanda and Anthony's lives versus the criminal conduct which the government sought to portray.

25 In addition to Anam, defense witnesses Leslie Hernandez and Ramon Quintanilla testified  
26 at trial but were wholly unprepared for their testimony by petitioner's trial counsel. Additionally,  
27 exculpatory testimony relating to how petitioner compassionately cared for both Amanda and  
28 Anthony could have been provided by these two witnesses but was not presented due to trial



1 counsel's failure to adequately investigate and prepare for petitioner's trial. Leslie Hernandez's  
2 declaration is attached hereto as Exhibit K. Ramon Quintanilla's declaration is attached hereto as  
3 Exhibit L.

4 Beyond the witnesses who testified at trial for petitioner, there were two other witnesses who  
5 could have presented exculpatory evidence on behalf of petitioner but were never contacted and/or  
6 called by petitioner's trial counsel. Attached hereto as Exhibit M is the declaration of Mayra-Alicia  
7 Quintanilla. Attached hereto as Exhibit N is the declaration of Amelia Guerrero. Both Mayra-Alicia  
8 Quintanilla and Amelia Guerrero were available as witnesses in petitioner's case to testify as to how  
9 he took care of Amanda and Anthony but were never contacted and/or called as witnesses. As to Ms.  
10 Guerrero, she states in her declaration that Amanda told her that "Angel is my Mom's boyfriend and  
11 he protects me from my Dad." This testimony, if presented at trial, would have served to directly  
12 impeach the accusatory testimony of Ruby Rubio and her daughter, Amanda.

13 Defense counsel's failure to investigate and present this powerful evidence to the jury  
14 violated petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment  
15 and his right to due process under the Fifth Amendment. As such, petitioner's conviction must be  
16 reversed.

17 3. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE BY  
18 FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT  
19 THE ALLEGED VICTIM, AMANDA, WAS NOT PHYSICALLY  
ABUSED BY PETITIONER, BUT IN FACT THE CHILDREN  
WERE WELL TAKEN CARE OF BY PETITIONER.

20 As set forth in the preceding section 2, defense counsel failed to investigate and present  
21 witness testimony that both Amanda and Anthony were well-taken care of by petitioner.

22 However, beyond the fact that several witnesses were available to testify for petitioner and  
23 were not contacted and/or called by defense counsel, Leslie Hernandez observed Amanda completely  
24 naked in mid-November of 1996 and did not observe any bruises, abrasions, cuts, scratches welts  
25 or marks on Amanda's body. See the attached declaration of Leslie Hernandez (Exhibit K).

26 As with Leslie Hernandez, Ramon Quintanilla had an opportunity to observe Amanda's body  
27 in the time period in which the alleged sexual abuse took place. According to Mr. Quintanilla, on  
28 the night before petitioner was arrested, which would have been **after** the alleged abuse by petitioner

1 occurred, Quintanilla had an opportunity to observe both Amanda and Anthony. Ramon Quintanilla  
2 did not observe any bruises, scarring, abrasions, cuts or anything Quintanilla would have considered  
3 abuse. See the attached declaration of Ramon Quintanilla (Exhibit L).

4 Defense counsel's failure to investigate and present this evidence at trial severely crippled  
5 petitioner's case, particularly as it related to the critically important issue of petitioner's credibility  
6 versus that of Amanda and her mother, Ruby Rubio. Once again, defense counsel's failure to  
7 adequately represent petitioner resulted in a denial of his Sixth Amendment right to effective  
8 representation and his Fifth Amendment right to due process. Based on these asserted and proven  
9 denial of his constitutional rights, petitioner's conviction must be reversed.

10 4. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE BY  
11 FAILING TO PRESENT EVIDENCE THAT AMANDA STATED  
12 TO AMELIA GUERRERO THAT PETITIONER PROTECTED  
HER FROM HER FATHER.

13 Had defense counsel conducted proper pretrial investigation of petitioner's case, he would  
14 have discovered that Amelia Guerrero was told by Amanda that petitioner actually protected Amanda  
15 from her father. Ms. Guerrero states that at petitioner's mother's 50<sup>th</sup> birthday party held in  
16 November of 1996, **which is prior in time to the alleged incident for which petitioner was**  
17 **charged in this case**, Amanda told Amelia Guerrero that, "Angel is my Mom's boyfriend and he  
18 protects me from my Dad." See Exhibit N. As stated previously, Amanda's dad is Ivan Acosta,  
19 whom petitioner understood was the person who, in truth and in fact, was the one that molested  
20 Amanda.

21 Defense counsel's failure to investigate and present this evidence at trial served to  
22 significantly prejudice petitioner's defense. The battle for credibility between petitioner and his  
23 accusers, Ruby Rubio and Amanda, was **the** critical factor in determining whether petitioner would  
24 be acquitted. The absolute and total failure of defense counsel to investigate and present defense  
25 witnesses who could have lent great weight and credibility to petitioner's testimony and defense was  
26 inexcusable. Defense counsel's failure in this regard removed any semblance of effective  
27 representation. Based on this clear violation of both his Sixth Amendment right to competent  
28 counsel and Fifth Amendment right to due process of law, this Court is mandated to reverse

1 petitioner's conviction.

2 5. DEFENSE COUNSEL FAILED TO INVESTIGATE AND  
3 PRESENT EVIDENCE THAT RUBIO HAD A MOTIVE TO  
4 FALSELY ACCUSE PETITIONER OUT OF FEAR OF HER  
PARAMOUR'S JEALOUSY OVER HER CLOSE RELATIONSHIP  
WITH PETITIONER.

5 On this issue, the declaration of petitioner's appellate counsel Kat Kozik is attached hereto  
6 as Exhibit O. The court record reflects that defense counsel intended to present evidence that  
7 petitioner had threatened to report Rubio for harboring Deltoro when he was a fugitive. See Exhibit  
8 O, pp. 4-5; Exhibit B - Supp. RT, 11; Exhibit C - Supp. CT 2: 53. However, defense counsel failed  
9 to investigate whether there was any independent proof of the matter. In point of fact, independent  
10 proof did exist. Included herewith as Exhibit P are law enforcement records regarding Ruby Rubio's  
11 boyfriend, Onorato Deltoro. The pages in Exhibit P are numbered as pages 65 through 78.  
12 Specifically, these records document an incident where Deltoro was arrested after severely beating  
13 Rubio while she was pregnant with their child, in front of several witnesses, because Rubio merely  
14 spoke to a male neighbor. See Exhibit P, pp. 65-78. Additionally according to the Hayward Police  
15 Department incident report, Ruby Rubio stated to police that, "She provided me with Deltoro's real  
16 name & said he had used "Lopez" to avoid detection of a warrant out of Oakland." See Exhibit P,  
17 page 69.

18 In the case at bar, it was clear that petitioner's close relationship with Rubio presented a  
19 threat to Rubio's safety and relationship with Deltoro, whom she married after the domestic violence  
20 incident. (Exhibit B - RT 214, 246, 616.) Based on Deltoro's past conduct, Rubio had cause to fear  
21 physical harm if Deltoro found out that she and petitioner were as she put it, "best friends." (Exhibit  
22 B - RT 271.) Any reasonably competent defense attorney would have cross-examined Rubio about  
23 these matters to establish a basis for the jury to infer that Rubio had a motive to coach her children  
24 to fabricate charges against petitioner to get him out of her life. The failure by defense counsel to  
25 investigate Deltoro's criminal background and present this evidence at trial not only falls below the  
26 objective standard of reasonableness required by the Sixth Amendment and Strickland, but  
27 additionally serves to further undermine confidence in the verdict. As such, petitioner's conviction  
28 must be reversed.

1           6.     DEFENSE COUNSEL FAILED TO PRESENT EVIDENCE  
2                 PROMISED IN OPENING STATEMENT THAT THE  
3                 PETITIONER THREATENED TO REPORT RUBIO FOR HER  
               ILLEGAL ACTIVITIES JUST BEFORE RUBIO REPORTED  
               PETITIONER TO THE POLICE.

4           In his opening statement, defense counsel told the jury to expect evidence that petitioner and  
5     Rubio had argued when petitioner returned Amanda and Anthony to her and during that argument,  
6     petitioner threatened to report Rubio, "for certain things that she had done that he thought were  
7     illegal related to [Onorato Deltoro]." (Exhibit B - 6/9/99 Supp. RT 11.) It was established at trial  
8     that Onorato Deltoro was the boyfriend of Ruby Rubio during the period of time that petitioner  
9     babysat Amanda and Anthony. The evidence promised by defense counsel on this point would have  
10    permitted the jury to conclude that Rubio falsely reported petitioner for abusing her children as a  
11    preemptive strike against petitioner's promised action against Rubio. Additionally, such evidence  
12    would have allowed the jury to understand the level of hostility Rubio carried against petitioner such  
13    that Rubio would misinterpret any statement made by Amanda or Anthony. Clearly, this was  
14    defense counsel's tactic as he argued Rubio's hostility and misinterpretation in closing argument.  
15    (Exhibit B - RT 755, 758, 767, 771, 774, 783, 785.)

16           However, during the trial, defense counsel failed to deliver the promised "threat evidence."  
17    On direct examination of the petitioner, defense counsel did not ask petitioner any question to elicit  
18    this "threat evidence." When defense counsel, in opening statement, promises the jury he is going  
19    to deliver certain evidence but then fails to do so, the entire defense lacks credibility to the jury.  
20    Additionally, the jury has the right to infer that if the promised evidence comes from the defendant  
21    and then is not delivered, the defendant may be lying about the asserted evidence and decided not  
22    to testify to such facts under oath. Such an inference is devastating to the defendant. In this case,  
23    petitioner never recanted his statement. Rather, his trial counsel failed to produce the evidence for  
24    the jury due to his own incompetence and only served to prejudice petitioner's defense.

25           It was imperative for the jury to hear some reason why Amanda would falsely accuse  
26    petitioner of molesting her. Evidence suggesting that Amanda's mother, Ruby Rubio, heard  
27    petitioner's threat and feared being turned into the police permitted the reasonable inference that  
28    Rubio coached Amanda to lie against petitioner, either in retaliation or as a preemptive strike against

1 him. Either way, defense counsel's failure to produce the promised "threat evidence" deprived the  
2 jury of a compelling basis for finding reasonable doubt to convict. Finally, in a case where the  
3 believability of the petitioner was paramount to a successful defense, it gave the jury reason to  
4 discount petitioner's testimony and to generally mistrust petitioner's entire defense. Counsel's  
5 omission of this evidence rendered his representation ineffective and served to prejudice petitioner  
6 such that his conviction must be reversed.

7       7. DEFENSE COUNSEL FAILED TO BRING TIMELY AN  
8 EVIDENCE CODE § 782 MOTION.

9       An important component of the defense strategy in petitioner's case was to bring to light  
10 evidence that Amanda had been molested by her natural father, Ivan Acosta, prior in time to the  
11 allegations against petitioner. At trial, and without having previously filed a motion under Evidence  
12 Code § 782, defense counsel asked Amanda if she had ever complained to petitioner that Ivan had  
13 touched her in a way she didn't like. Before the trial court could rule on an objection lodged by the  
14 government, Amanda responded by stating, "My dad or my uncle - -" (Exhibit B - RT 153, lines 6-  
15 10). Petitioner argues that if Amanda had not been previously touched in an inappropriate manner  
16 by either her dad Ivan, or her uncle, she would have simply responded, "No." Further, Petitioner  
17 contends that Amanda's response opened the door to a relevant inquiry regarding whether she had  
18 been molested by someone other than and to the exclusion of petitioner. The government objected  
19 and after an unreported bench conference, defense counsel simply moved on to a different topic of  
20 questioning.

21       Two days later, defense counsel did file an Evidence Code § 782 motion, attached hereto as  
22 Exhibit E, seeking the right to question Amanda regarding her prior molest by Acosta as well as  
23 asking Amanda about her observing her mother having sex with other men. The trial court denied  
24 the motion holding it to be untimely as it was brought after Amanda was off the stand as a  
25 prosecution witness and the trial court did not want to subject her to the inconvenience of having to  
26 testify again. (Exhibit B - RT 471, 473-474.)

27       Defense counsel's failure to bring the Evidence Code § 782 motion pretrial constituted  
28 ineffective assistance and prejudiced petitioner's defense. As noted previously, an important part



of petitioner's defense was to show that Amanda had prior knowledge of sexual matters due to her molest by Ivan Acosta along with her observations of her mother having sex with other men. However, due to defense counsel's failure to timely bring an Evidence Code § 782 motion, this "prior sex evidence" relating to Amanda was excluded. The exclusion of this evidence prejudiced petitioner's case in that it would have raised a reasonable doubt about Amanda's accusations against petitioner. See LaJoie v. Thompson, 217 F.3d 663 (9<sup>th</sup> Cir. 2000); People v. Daggett, 225 Cal.App3d 751, 757 (1990). As such, petitioner was denied his Sixth Amendment right to effective assistance of counsel as well as his Fifth Amendment right to due process. Based on these constitutional violations, petitioner's conviction must be reversed.

8. DEFENSE COUNSEL FAILED TO PRESERVE THE RECORD AS TO WHY COUNSEL DROPPED QUESTIONING THE COMPLAINING WITNESS ABOUT HER PRIOR SEXUAL ACTIVITY.

As set forth in the previous issue, as a result of the unreported bench conference, petitioner's defense counsel did not preserve the trial record regarding the court's denial of his right to question Amanda about past sexual activities. (Exhibit B - RT 152-153) Consequently, it is unclear as to whether defense counsel moved on to another topic voluntarily or whether it was as a result of the trial court's directive to follow the proper procedure for Evidence Code § 782. Given the fact that defense counsel filed an Evidence Code § 782 motion two days later, it appears the trial court instructed counsel to file a formal Evidence Code § 782 motion if he sought to explore Amanda's involvement in sexual activity.

A trial attorney has a duty to properly preserve the record for appeal and in this case, defense counsel's failure to preserve the record constituted ineffective assistance. In this instance, petitioner's case was prejudiced by his defense counsel's failure to preserve the trial court record. It is important to note that the proper analysis of petitioner's claim that the trial court erred in refusing to permit him to directly cross examine Amanda about her prior molest and viewing of her parents sexual activity, **without resorting to Evidence Code § 782**, requires reversal. Delaware v. Van Arsdall, 475 U.S. 673, 685 (1986).

1 Assuming the damaging potential of Amanda's cross-examination was fully realized  
 2 regarding her prior sexual activity and knowledge, defense counsel's error was not harmless. The  
 3 verdict in petitioner's case hinged in large part on the source of Amanda's chlamydia infection and  
 4 her past sexual knowledge. These facts directly bore on the credibility as between petitioner, who  
 5 testified at trial, and Amanda. The denial of effective cross-examination by defense counsel of  
 6 Amanda was extremely prejudicial to petitioner's case. Such a denial violated petitioner's Sixth  
 7 Amendment right to effective assistance of counsel, his Fifth Amendment right to due process, and  
 8 mandates a reversal of his conviction.

9 9. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE BY  
 10 FAILING TO REQUEST AN INSTRUCTION ON THE LESSER  
 11 INCLUDED OFFENSE OF NON-FORCIBLE ORAL  
 12 COPULATION.

13 Beyond the fact the trial court erred in not instructing the lesser included offense of oral  
 14 copulation, trial counsel was ineffective in failing to affirmatively request such an instruction. The  
 15 prejudice to petitioner for such failure by trial counsel is set forth in GROUND FIVE, and is  
 16 incorporated herein by reference. This failure to request the lesser included instruction violated  
 17 petitioner's Sixth Amendment right to effective assistance of counsel, his Fifth Amendment right  
 18 to due process and must result in his conviction being reversed.

19 10. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE BY  
 20 FAILING TO OBJECT THAT WHERE THE PENAL CODE IS  
 21 AMBIGUOUS, THE PETITIONER MUST BE GIVEN THE  
 22 BENEFIT OF A MORE LENIENT INTERPRETATION.

23 The doctrine of lenity provides that a defendant be given the benefit of every reasonable  
 24 doubt, whether it arises from a question of fact or by way of the proper interpretation of a statute.  
 25 United States v. Bass, 404 U.S. 336, 347 (1971). In petitioner's case, Penal Code § 269(a)(4) states  
 26 that where a defendant commits a violation of Penal Code § 288a by force, or fear of immediate and  
 27 unlawful bodily injury, he must be imprisoned for 15 years to life. However, a review of Penal Code  
 28 § 288a(c)(2) indicates that for the exact illegal conduct proscribed by Penal Code § 269, the  
 punishment provided is three, six or eight years. Petitioner contends that Penal Code § 269 and  
 Penal Code § 288a equally apply to the misconduct in his case. Further, there is ambiguity between  
 the statutes as there is no basis for determining which statute should control. Additionally, defense

1 counsel was ineffective in not arguing under the doctrine of lenity that petitioner should be sentenced  
 2 under the less severe proscriptions of Penal Code § 288a rather than the much more severe mandates  
 3 of Penal Code § 269.

4 Based on the foregoing, petitioner should be given the benefit of the doctrine of lenity and  
 5 this Court vacate the original sentence of 15 years to life and remand the case for resentencing under  
 6 Penal Code § 288a.

## 7 II. CONCLUSION RE: IAC CLAIMS

8 The substantive errors committed by defense counsel in his representation of petitioner, as  
 9 set forth above, resulted in a complete and total denial of petitioner's Sixth Amendment right to  
 10 effective representation enough to require this Court to reverse his conviction. Further, petitioner  
 11 asserts that had a competent attorney utilized the evidence that could and should have been  
 12 presented in his defense, there is more than a reasonable probability that petitioner would have  
 13 been acquitted.

## 14 GROUND TEN

15 THE OVERALL EFFECT OF THE ACCUMULATION OF ERRORS SET  
 16 FORTH ABOVE RESULTED IN A DENIAL OF PETITIONER'S FIFTH  
 17 AMENDMENT RIGHT TO DUE PROCESS, HIS SIXTH AMENDMENT RIGHT  
 TO A FAIR TRIAL AND MANDATES REVERSAL OF HIS CONVICTION.

18 The Ninth Circuit has considered this claim in a number of cases. In the case of United  
 19 States v. Frederick, 78 F.3d 1370 (9<sup>th</sup> Cir. 1996), the Court stated:

20 "In some cases, although no single trial error examined in isolation  
 21 is sufficiently prejudicial to warrant reversal, the cumulative effect  
 22 of multiple errors may still prejudice a defendant. See *United States*  
 23 *v. Green*, 648 F.2d 587 (9<sup>th</sup> Cir. 1981). Where, as here, there are a  
 24 number of errors at trial, "a balkanized, issue-by-issue harmless  
 25 errors review" is far less effective than analyzing the overall effect  
 26 of all the errors in the context of the evidence introduced at trial  
 27 against the defendant. *United States v. Wallace*, 848 F.2d 1464,  
 1476 (9<sup>th</sup> Cir. 1988). In those cases where the government's case is  
 weak, the defendant is more likely to be prejudiced by the effect of  
 cumulative errors. *United States v. Berry*, 627 F.2d 193 (9<sup>th</sup> Cir.  
 1980), cert. denied, 449 U.S. 1113, 66 L.Ed. 843, 101 S.Ct. 925  
 (1981). This is simply the logical corollary of the harmless error  
 doctrine which requires us to affirm a conviction if there is  
 overwhelming evidence of guilt."

28 In Derden v. McNeel, 938 F.2d 605 (5<sup>th</sup> Cir. 1991), a state case in a 2-1 decision, but



1 unanimous on this point wrote:

2 "The United States Constitution sets a floor which the state may not  
3 go below," at 609 (footnote omitted); " This is a Fourteenth  
4 Amendment Due Process inquiry. . . Several errors taken together  
5 can also violate a petitioner's right to due process and cause the trial  
6 to be fundamentally unfair," at 610 (Citing and quoting cases); " - - -  
7 - - the fundamentally unfair trial which violates due process is rare,  
8 but when it does occur [cumulative error] analysis should be  
9 available to [habeas] petitioners," at 610 (reh'g en banc, *Derden v.*  
10 *McNeel*, 978 F.2d 1453 (5<sup>th</sup> Cir. 1992)(11-2 decision)([We now hold  
11 that federal habeas corpus relief may only be granted for cumulative  
12 errors..... (3) the errors 'so infested the entire trial that the resulting  
13 conviction violates due process," at 1454 (citing *Cupp v. Naughten*; -  
14 - - - Fourth, the federal court must review the record as a whole to  
15 determine whether the errors more likely than not caused a suspect  
16 verdict." at 1458 - - - - "

17 In Mak v. Blodgett, 970 F.2d 614 (9<sup>th</sup> Cir.1992), the Court evaluated that case in its entirety  
18 finding that it met the first prong of Strickland. The Court then followed with a prejudice analysis  
19 looking at all of the errors by counsel. In looking at the prejudice aspects as enunciated in  
20 Strickland, the Ninth Circuit held,

21 "Nothing in Strickland suggests that a proportionality review is  
22 inappropriate when considering prejudicial effect, and the State cites  
23 to no case law that supports such a notion.

24 On the whole, we cannot find fault with the district court's prejudice  
25 analysis. Although the present case differs from previous cases in  
26 which no prejudice was found, because in this case the proffered  
27 evidence would not have opened the door to damaging  
28 evidence,\*fn10 it also differs from cases in which prejudice was  
29 found because here, the proffered evidence was far less  
30 exculpatory.\*fn11 These cases demonstrate that this case falls  
31 somewhere in the middle of a typical Strickland prejudice analysis.

32 We do not need to decide whether these deficiencies alone meet the  
33 prejudice standard because other significant errors occurred that,  
34 considered cumulatively, compel affirmance of the district court's  
35 grant of habeas corpus as to the sentence of death.\*fn12 See *United*  
36 *States v. Tucker*, 716 F.2d 576, 595 (9<sup>th</sup> Cir. 1983) ("a court may  
37 find unfairness - and thus prejudice - from the totality of counsel's  
38 errors and omissions"); *Ewing v. Williams*, 596 F.2d 391, 395 (9<sup>th</sup>  
39 Cir. 1979) ("prejudice may result from the cumulative impact of  
40 multiple deficiencies") (quoting *Cooper v. Fitzharris*, 586 F.2d 1325,  
41 1333 (9<sup>th</sup> Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 59 L. Ed.  
42 2d 793 , 99 S. Ct. 1542 (1979))"

43 In summary, there are nine separate and distinct grounds set forth herein which contain  
44 significant violations of petitioner's constitutional rights as follows:

1           1. The government committed multiple violations of their discovery obligation  
2           under Brady by failing to disclose and/or provide exculpatory evidence to the  
3           defense.

4           2. The trial court erred in precluding petitioner from exploring if, 1) Amanda had  
5           been molested by her natural father to establish an alternate source for Amanda's  
6           chlamydia and; 2) that she had witnessed adult sexual conduct thereby obtaining her  
7           sexual knowledge.

8           3. The trial court erred in excluding evidence of petitioner's negative penile swab  
9           culture test for chlamydia.

10          4. Petitioner's conviction on Count Two must be reversed since the jury was  
11          erroneously instructed that "duress" includes "hardship."

12          5. The trial court failed to instruct on the lesser included offense of non-forcible  
13          oral copulation.

14          6. During jury deliberations, the trial court answered questions from the jury  
15          without the petitioner or his defense counsel being personally present.

16          7. The evidence was legally insufficient to support the conviction on Count Two  
17          that petitioner committed the oral copulation by means of duress.

18          8. Petitioner's concurrent terms for Counts Four and Seven must be stayed as they  
19          do not comply with Penal Code § 654 and Apprendi.

20          9. The numerous and significant errors of trial counsel prejudiced petitioner's  
21          defense at trial thereby violating his Fifth Amendment right to due process and his  
22          Sixth Amendment right to effective assistance of counsel and a fair trial.

23          In the case at bar, even if each of the nine separate grounds asserted herein did not result in  
24          sufficient prejudice to warrant relief, a point which petitioner does not concede, this tenth ground  
25          of the cumulative prejudice, which joins all of these nine grounds together, certainly warrants  
26          reversal of petitioner's conviction.

V

**CONCLUSION**

Based on the facts, law and arguments presented herein, defendant Angel Jesus Alvarez was denied his federal constitutional rights to due process, his right to effective assistance of counsel and his right to a fair trial mandating reversal of his conviction by this Court.

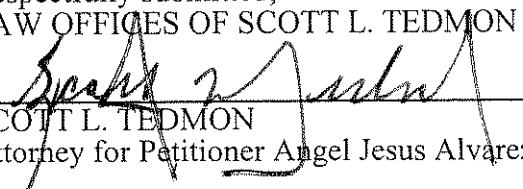
VI

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner Angel Jesus Alvarez prays that this Court:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint;
2. Order Respondent to answer why Petitioner is not entitled to the relief sought;
3. Grant Petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;
4. Grant Petitioner the right to conduct discovery, including depositions, request for admissions and interrogatories and the means to preserve the testimony of witnesses;
5. Order an evidentiary hearing at which Petitioner will offer this and further proof in support of the allegations herein;
6. Permit Petitioner an opportunity to supplement this petition to include claims that become known as the result of further investigation and information that comes to light;
7. After full consideration of the issues raised in this petition, vacate the judgment and sentence imposed upon Petitioner in Santa Clara County Superior Court Case Number 198084.
8. Grant Petitioner such further relief as is appropriate in the interests of justice.

DATED: August 10, 2006

Respectfully submitted,  
LAW OFFICES OF SCOTT L. TEDMON  
  
SCOTT L. TEDMON  
Attorney for Petitioner Angel Jesus Alvarez

VII

VERIFICATION

I, ANGEL JESUS ALVAREZ, declare under penalty of perjury that I have reviewed the foregoing Petition for Writ of Habeas Corpus and the facts contained therein are true and correct to the best of my recollection. Signed and dated this 10<sup>th</sup> day of August, 2006, at San Quentin, California.

  
ANGEL JESUS ALVAREZ, Petitioner

## EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

<p>THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>ANGEL JESUS ALVAREZ, aka ANGELO JESUS FALCONI Defendant(s).</p>	<p>August 4, 1997</p> <p>DA NO CEN 961130672 96040691 AA</p> <p>INFORMATION NO. 198084</p>	
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I N F O R M A T I O N  
S U M M A R Y

Ct. No.	Charge	Charge Range	Defendant	Special Allegation	Alleg. Effect
1	PC288.5(A)	6-12-16	ALVAREZ, ANGEL JESUS		
2	PC269		ALVAREZ, ANGEL JESUS		
3	PC288(D)(1)	3-6-8	ALVAREZ, ANGEL JESUS	PC 12022.8	5 YRS
4	PC273A(A)	2-4-6	ALVAREZ, ANGEL JESUS		
5	PC273D(A)	2-4-6	ALVAREZ, ANGEL JESUS		
6	PC273D(A)	2-4-6	ALVAREZ, ANGEL JESUS		
7	PC273A(A)(1)	2-4-6	ALVAREZ, ANGEL JESUS		
Prior(s):			ALVAREZ, ANGEL JESUS		



)  
The District Attorney of the County of Santa Clara, by this Information alleges that:

COUNT 1

On and between January 1, 1994 and November 22, 1996, in the County of Santa Clara, State of California, the crime of CONTINUOUS SEXUAL ABUSE, in violation of PENAL CODE SECTION 288.5(A), a FELONY, was committed by ANGEL JESUS ALVAREZ, who did while residing in the same home with and having recurring access to a minor child, to wit: JANE DOE, under the age of fourteen years, to wit: 3, 4, 5 YEARS OF AGE years of age, did, over a period of not less than three months in duration, engage in three and more acts of substantial sexual conduct with said child.

\* \* \* \* \*

COUNT 2

On and between January 1, 1994 and November 22, 1996, in the County of Santa Clara, State of California, the crime of AGGRAVATED SEXUAL ASSAULT OF A CHILD, in violation of PENAL CODE SECTION 269, a FELONY, was committed by ANGEL JESUS ALVAREZ, who did commit a violation of Penal Code Section 288a by force, violence, duress, menace, and fear of immediate and unlawful bodily injury upon JANE DOE, a child under 14 years of age, to wit: 3, 4, 5 YEARS OF AGE years of age, and 10 and more years younger than the defendant.

It is further alleged that the defendant(s) is/are not eligible for probation and the suspension of sentence, within the meaning of Section 1203.065(a) of the Penal Code.

\* \* \* \* \*

COUNT 3

On and between January 1, 1994 and November 22, 1996, in the County of Santa Clara, State of California, the crime of LEWD/LASCIVIOUS ACT-CHILD-FORCE/VIOLENCE/DURESS/MENACE/FEAR, in violation of PENAL CODE SECTION 288(B)(1), a FELONY, was committed by ANGEL JESUS ALVAREZ, who did willfully and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of JANE DOE, a child under the age of 14 years, to wit: 3, 4, 5 YEARS OF AGE years of age, by use of force, violence, duress, menace, and fear of immediate and unlawful bodily injury on said child and another person and with the intent of arousing, appealing to and gratifying the lust, passions, and sexual desires of the said defendant and of said child.

It is further alleged that the defendant(s) is/are not eligible for probation and the suspension of sentence, within the meaning of Section 1203.066(a)(1) of the Penal Code.

(GBI) It is further alleged that in the commission of the foregoing offense, the said defendant, ANGEL JESUS ALVAREZ, personally inflicted great bodily injury upon the victim of said offense, to wit: JANE DOE, within the meaning of Section 12022.8 of the Penal Code.

\* \* \* \* \*

COUNT 4

On and between November 15, 1996 and November 22, 1996, in the County of Santa Clara, State of California, the crime of CAUSE/PERMIT PAIN SUFFERING OR ENDANGER/INJURE CHILD, in violation of PENAL CODE SECTION 273A(A), a FELONY, was committed by ANGEL JESUS ALVAREZ, who under circumstances and conditions likely to produce great bodily harm and death, did willfully cause and permit a child, to wit: JANE DOE to suffer, and did inflict on that child unjustifiable physical pain and mental suffering, and while having the care and custody of the child, did willfully cause and permit the person and health of that child to be injured, and did willfully cause and permit that child to be placed in a situation where his or her person and health were endangered.

\* \* \* \* \*

COUNT 5

On and between November 15, 1996 and November 22, 1996, in the County of Santa Clara, State of California, the crime of INFLECTING CORPORAL INJURY UPON A CHILD, in violation of PENAL CODE SECTION 273D(A), a FELONY, was committed by ANGEL JESUS ALVAREZ, who did willfully inflict upon a child, to wit: JANE DOE, cruel and inhuman corporal punishment and injury resulting in a traumatic condition.

\* \* \* \* \*

COUNT 6

On and between November 15, 1996 and November 22, 1996, in the County of Santa Clara, State of California, the crime of INFLICTING CORPORAL INJURY UPON A CHILD, in violation of PENAL CODE SECTION 273D(A), a FELONY, was committed by ANGEL JESUS ALVAREZ, who did willfully inflict upon a child, to wit: JOHN DOE, cruel and inhuman corporal punishment and injury resulting in a traumatic condition.

\* \* \* \* \*

COUNT 7


On and between November 15, 1996 and November 22, 1996, in the County of Santa Clara, State of California, the crime of ENDANGERING THE HEALTH OF A CHILD, in violation of PENAL CODE SECTION 273A(A)(1), a FELONY, was committed by ANGEL JESUS ALVAREZ, who under circumstances and conditions likely to produce great bodily harm and death, and while having the care and custody of a child, to wit: JOHN DOE, did willfully cause and permit the person and health of said child to be injured, and did willfully cause and permit said child to be placed in such a situation that its person and health were endangered.

\* \* \* \* \*

Pursuant to Penal Code Sections 1054 through 1054.7, the People request that, within 15 days, the defendant and/or his/her attorney disclose: (A) The names and addresses of persons, other than the defendant, he/she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial; (B) Any real evidence which the defendant intends to offer in evidence at the trial. This request is a continuing request, to cover not only all such material currently in existence, but all material which comes into existence to the conclusion of this case.

George W. Kennedy  
District Attorney

YMP SJPB/470

By   
VICTORIA C. BROWN  
Deputy District Attorney

## EXHIBIT B



REPORTER'S TRANSCRIPT  
"RT"

1 Is there something about him and his pee-pee that made  
2 you feel bad?

3 MR. SCHROEDER: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: I guess so, yeah.

6 Q (BY MS. MCKAY-MCCOY) I'm sorry?

7 A I guess so.

8 Q Will you tell us about what it is, his pee-pee that  
9 made you feel bad?

10 A I don't know what it is.

11 Q Can you remember what it is?

12 A Like water, something.

13 Q Like water or something?

14 A (Witness nods head.)

15 Q Okay. Where did the water or something come from?

16 A I don't know.

17 Q Did it come from some part of his body?

18 A I don't know.

19 Q Where did it go?

20 A What do you mean?

21 Q Well, where did it come from, the water or something?  
22 Where did it come from?

23 A The --

24 Q I'm sorry, from what?

25 A From the private.

26 Q Oh, from the private. His private?

27 A Uh-huh.

28 Q That's a yes. When it came out of his private, where

1 did it go, did it stay there or did it go somewhere?

2 A Go somewhere.

3 Q Did it go somewhere near you?

4 A Yeah.

5 Q Did it go somewhere on you?

6 A No.

7 Q Where did it go?

8 A In my mouth.

9 Q Was it inside your mouth or on the outside of your  
10 mouth?

11 A Inside.

12 Q Inside your mouth. What did it taste like?

13 A Nothing.

14 Q Nothing.

15 A No.

16 Q Did it taste good or bad or --

17 A Bad.

18 Q Bad?

19 A (Witness nods head.)

20 Q When the water-type stuff went from out of his private  
21 into your mouth, did he say anything while that was  
22 happening?

23 A (Witness shakes head.)

24 Q No. Did this happen in a house or in a car or in a  
25 school yard or where?

26 A It would be in the van or a house.

27 Q In a house?

28 A (Witness nods head.)

1 MR. SCHROEDER: I couldn't hear her.

2 THE COURT: She said in a van or a house.

3 Q (BY MS. McKAY-McCOY) Did it happen in a van and a  
4 house, both places?

5 A (Witness nods head.)

6 Q That's a question. Yes?

7 A (Witness nods head.)

8 Q I'll ask you about the stuff in the van first and then  
9 the house. Okay.

10 When did the water-type stuff came out of his private  
11 and into your mouth and you were in the van, was Angel there  
12 too -- I mean Anthony there too, your brother?

13 A (Witness nods head.)

14 Q Where was he?

15 A In the van.

16 Q Was he in the van?

17 A (Witness nods head.)

18 Q Yes?

19 A (Witness nods head.)

20 Q Was he asleep or awake?

21 A Awake.

22 Q Was he pretending to be asleep or was he awake?

23 MR. SCHROEDER: Objection.

24 THE COURT: Overruled. Could you repeat what you  
25 said?

26 THE WITNESS: Asleep or awake.

27 Q (BY MS. McKAY-McCOY) Did it happen more than once in  
28 the van that the water stuff came out of his private into

1 younger then and I was at the house and there was water  
2 stuff coming out of Angel's private, what do you see?

3 A I was in the dark.

4 Q It was dark?

5 A Dark.

6 Q What part of the house were you in?

7 A The living room.

8 Q In the living room?

9 A (Witness nods head.)

10 Q Is that where you slept when you stayed at the house?

11 A Sometimes. Sometimes I'll sleep with the little girl  
12 inside the bed.

13 Q Or sometimes you slept in the van?

14 A No.

15 Q I'm sorry. Thank you for correcting me. What did you  
16 say?

17 A Or sometimes I would sleep in the bed with the little  
18 girl.

19 Q With the little girl who lived there?

20 A Yeah, she was older than me.

21 Q Okay. Thank you for telling me.

22 Did his private -- the water stuff from his private in  
23 your mouth, did his private ever go in your mouth? Not the  
24 water stuff but the private that the water stuff came out  
25 of, did that go into your mouth?

26 A (Witness nods head.)

27 Q Did that happen more than one time?

28 A (Witness nods head.)

1 MR. SCHROEDER: Objection; vague as to location.

2 THE COURT: Overruled.

3 Q (BY MS. MCKAY-McCOY) When the water stuff came out of  
4 his private into your mouth, did his private go into your  
5 mouth too? Is that a clear question?

6 A (Witness nods head.)

7 Q Was it both, the water stuff and the private that went  
8 into your mouth?

9 A (Witness nods head.)

10 Q Okay. Thank you for answering yes. It helps if you  
11 answer out loud.

12 Did his private ever go in your ear?

13 A (Witness shakes head.)

14 Q Did his private ever go in your hand?

15 A (Witness shakes head.)

16 Q Did his private ever go near your private?

17 A Sometimes, yeah.

18 Q Okay. Did that happen more than once?

19 A (Witness nods head.)

20 Q Yes. Okay. Did that happen in the van?

21 A (Witness nods head.)

22 Q Yes, did it happen in the house?

23 A (Witness nods head.)

24 Q Did it happen anywhere else?

25 A (Witness shakes head.)

26 Q When his private went in your -- did it go in your  
27 private or near it or on your leg or what? Is that a clear  
28 question?



1 first grade or before? Do you remember?

2 A I think it was first grade. Kindergarten,  
3 kindergarten.

4 Q Kindergarten. Thank you.

5 And what grade were you in the last time it happened?

6 A First grade, first grade.

7 Q I would like to ask you some questions about his  
8 finger. Did he ever put his finger in your mouth?

9 A (Witness shakes head.)

10 Q Did he ever put his finger in your ear?

11 A (Witness shakes head.)

12 Q No. Did he ever put his finger in your private?

13 A (Witness nods head.)

14 Q Okay. Did that happen more than once?

15 A (Witness nods head.)

16 Q How old were you when it started?

17 A I don't know.

18 Q You don't remember?

19 A (Witness shakes head.)

20 Q Okay. When he put his finger in your private, did he  
21 touch your private with his finger?

22 A (Witness nods head.)

23 Q What kind of a touch?

24 A I don't know.

25 Q Okay. Let me give you some choices. You can use those  
26 or you can use whatever word you want.

27 Was it like a hard touch, like a slap or was it a pinch  
28 or was it a rub or was it a rub back and forth or was it a

1 squeeze or, I don't know, what kind of a touch?

2 A Like back and forth.

3 Q I'm sorry, back and forth? Like back and forth? Show  
4 me with your hand, please.

5 A Back and forth.

6 Q Oh, back and forth. Did that hurt?

7 A A little bit.

8 Q It did. Did he say anything while he was doing it?

9 A (Witness shakes head.)

10 Q No. Do you know how old you were when it stopped?

11 A When I was in second grade.

12 Q I would like to ask you some questions about his mouth.  
13 Did he ever give you a kiss with his mouth on your  
14 face?

15 A (Witness nods head.)

16 Q Sometimes?

17 A Sometimes.

18 Q Did it feel okay when he kissed you on the face?

19 A (Witness shakes head.)

20 Q No. What made it icky?

21 A I don't know.

22 Q Did he kiss you on the hand?

23 A (Witness shakes head.)

24 Q No. Did he kiss you on your butt, your bottom?

25 A (Witness shakes head.)

26 Q No. Did he kiss you on your private?

27 A (Witness shakes head.)

28 Q Did he use his tongue too, you know, like how you lick

1 an ice cream cone?

2 MR. SCHROEDER: Objection.

3 THE COURT: Overruled.

4 Q (BY MS. McKAY-McCOY) I want to make sure I'm clear. A  
5 kiss is like when you use your lips and a lick is like this,  
6 like you're licking an ice cream cone. Did he use his lips  
7 or tongue or both or either one? You tell me. On your  
8 private, I mean.

9 A Tongue.

10 Q I'm sorry?

11 A This.

12 Q Did you say lips or lick?

13 A Tongue.

14 THE COURT: She's gesturing for her tongue.

15 MS. McKAY-McCOY: I'm sorry, I can't see. I have  
16 to get taller. Maybe it would help if I stood up I could  
17 see more of your face.

18 Q (BY MS. McKAY-McCOY) He used his tongue on your  
19 private?

20 A (Witness nods head.)

21 Q How old were you when that started?

22 A I don't know.

23 MR. SCHROEDER: Objection; assumes facts not in  
24 evidence.

25 THE COURT: Overruled.

26 MR. SCHROEDER: Frequency and number.

27 THE COURT: Overruled.

28 Q (BY MS. McKAY-McCOY) Did it happen more than once that

1 he used his tongue on your private?

2 A (Witness nods head.)

3 Q Yes. Do you know how old you were when it stopped?

4 A I was 7 years old -- I was 7 years old, I was turning  
5 8.

6 Q Do you know did it happen more than once you said that  
7 he put his tongue on your private? Do you want me to ask  
8 the question again?

9 A Yes.

10 Q You can tell me any time if my question is dumb.

11 Did he put his tongue on your privates more than one  
12 different time? Is that a clear question?

13 A I don't know.

14 Q Okay. I'll try a different way. Did he put his tongue  
15 on your privates more than once?

16 A Uh-huh.

17 Q Was it usually daytime or nighttime or both? Or when  
18 did it happen?

19 A Usually nighttime.

20 Q Usually nighttime. Was it different nights, not all on  
21 the same night?

22 A I don't remember.

23 Q Is it hard to understand my question a little bit?

24 A No, not that much.

25 Q Okay. Did Angel ever say anything to you about his  
26 private and what was going on? Did he tell you what you  
27 were supposed to do or anything like that?

28 A (Witness shakes head.)

1 Q I couldn't hear you.

2 A Maybe at -- at a motel -- in a motel.

3 Q In a motel?

4 A Uh-huh.

5 Q It wasn't in the van, it was in a motel?

6 A What?

7 Q The other times that this happened, you said there were  
8 lots of other times that this happened, right?

9 A Uh-huh.

10 Q Okay. As I understood it before when you asked -- when  
11 Ms. McKay-McCoy asked you about it you said that it happened  
12 once at Ramon and Myra's and other times it was in the van?

13 A Yes.

14 Q Okay. Now are you saying now that it also -- that it  
15 happened in a motel?

16 A Uh-huh.

17 Q Okay. Did it ever happen in the van?

18 A Yes.

19 Q Okay. Can you tell us about how many times that was?

20 A I don't know.

21 Q Okay. Can you tell us about how many times it happened  
22 in a motel?

23 A I don't know how many times.

24 Q Well, did it happen more in a van or more in a motel?

25 A Maybe more in the van.

26 Q Okay. Your dad's name is Ivan, right?

27 A Yes.

28 Q And is Ivan -- you see Ivan, don't you?

1 A Yes.

2 Q And --

3 A I know the question already.

4 Q I couldn't hear you, I'm sorry.

5 A Never mind.

6 Q Do you remember complaining to Angel that Ivan had  
7 touched you in a way you didn't like?

8 MS. McKAY-McCOY: Objection. Excuse me, can we  
9 approach the bench?

10 THE WITNESS: My dad or my uncle --

11 THE COURT: Just a moment, please. We're going to  
12 talk over here. We'll be right back.

13 (Whereupon, the attorneys approach the bench.)

14 Q (BY MR. SCHROEDER) Do you have any idea how many times  
15 you had stayed in a motel with Angel?

16 A No.

17 Q Okay. When you stayed at the motel, was your brother  
18 there too?

19 A Yes.

20 Q Now, do you remember just before you talked to the  
21 police, just a few days before you talked to the police that  
22 you stayed at a motel with Angel?

23 A No.

24 Q You don't remember that?

25 A (Witness shakes head.)

26 Q Okay. You said that -- you described him putting his  
27 mouth -- or I'm sorry -- your mouth, that he put his penis  
28 or pee-pee inside your mouth; do you remember saying that?



1 '99. The baby is not here yet.

2 Q Okay. Are you married?

3 A Yes, I am.

4 Q What is your husband's name?

5 A Onorato Deltoro.

6 Q Can you spell that for the court reporter?

7 A O-n-o-r-a-t-o, D-e-l-t-o-r-o.

8 Q What city do you reside in?

9 A Oakland, California.

10 Q How long have you lived in Oakland?

11 A Mostly all my life.

12 Q Thank you. Do you know an individual named Angel  
13 Alvarez?

14 A Yes, I do.

15 Q How did you meet him?

16 A Through my -- how do you say, ex-sister-in-law.

17 Q What was Mr. Alvarez' relationship to your  
18 ex-sister-in-law?

19 A I believe they were just friends.

20 Q You met him through her?

21 A Yes.

22 Q Do you see Mr. Alvarez in court today?

23 A Yes.

24 Q Is he the man seated to my far right?

25 A Yes.

26 MS. McKAY-McCOY: May the record reflect the  
27 witness identified the defendant?

28 THE COURT: Yes, the record will so reflect.

1 Q When?

2 A Oh, when?

3 Q Thank you.

4 A I believe the appointment was around between maybe  
5 three and four in the afternoon.

6 Q Do you remember which day of the week?

7 A I believe it was -- I don't remember what day it was.

8 Q Okay. Did he agree to take the kids?

9 A Yes, 'cause he was -- I'm sorry.

10 Q Go ahead.

11 A Because he was going to get Anthony and Amanda  
12 something for them for their birthday because it was two or  
13 three days before their birthdays. We were going to have a  
14 party for them.

15 MR. SCHROEDER: Your Honor, I ask the mike be  
16 closer.

17 THE COURT: If you could speak into the microphone  
18 it would be helpful. Thank you.

19 Q (BY MS. McKAY-McCOY) On this occasion did he take care  
20 of all three kids or just Amanda and Anthony?

21 A Just Amanda and Anthony.

22 Q Did he usually just take care of Amanda and Anthony?

23 A He was with me. I have a sister take care of him  
24 because at the time I was breast feeding and Junior was too  
25 little for him to watch. That's why he didn't go with him.

26 Q This occasion around the time you had your wisdom teeth  
27 out, how long were Amanda and Anthony with him?

28 A He had took them, I believe he picked them up the night

1 before my appointment.

2 Q And how long did he keep them?

3 A He was supposed to bring them back that day. When he  
4 had called, I could barely talk on the phone 'cause my mouth  
5 was really swollen, both sides, because I had four taken  
6 out, the two top and two bottom. And he was like, I can't  
7 understand a word you're saying. I started laughing, I'm in  
8 too much pain, I can't tell. He said, okay. I'll do a  
9 favor, I will bring them back tomorrow because then they're  
10 going to be running around the house getting into things.  
11 This way you don't have to get after them, you just have to  
12 deal with Junior. But Junior at that time didn't even talk  
13 'cause he was still little.

14 Q When Amanda and Anthony went away with Mr. Alvarez on  
15 this occasion when you had your teeth out, did they have any  
16 unusual bruises or bumps or abrasions before they left?

17 A No.

18 Q Do you remember if they had any normal childhood bumps  
19 on their shins or something like that?

20 A I believe Amanda had like a little scar on her forehead  
21 from when she fell off her bike when she was two.

22 Q Apart from that?

23 A No.

24 Q When did Amanda and Anthony return with Mr. Alvarez?

25 A They returned the next day after my appointment. I  
26 believe it was between five and six.

27 Q Who brought them?

28 A Angel did, he brought them home.

1 Q Did you notice anything unusual about Anthony when you  
2 came in?

3 A I had noticed that his eyes were really red and sore.  
4 He had burns around the eyes.

5 Q I would like to ask you first about his eyeballs and  
6 then about the skin around his eyes. Were his eyeballs red?

7 A I believe they were a little red. They looked a little  
8 irritated but I was mainly concerned around his eyes right  
9 here.

10 Q What did you see on the skin around his eyes?

11 A It looked like it was burned.

12 Q In what way?

13 A Like the skin came off. They were really pink and  
14 white like the skin was peeling, and he had a whole bunch,  
15 like I don't know if it was Vaseline or ointment around his  
16 eyes.

17 Q Was it around both eyes?

18 A Excuse me?

19 Q Was it around both eyes?

20 A Both eyes.

21 Q Did you ask what happened?

22 A Exactly.

23 Q What did Anthony say?

24 A He said that Angel had put chili in his eyes.

25 Q What did the defendant say?

26 A He said -- he told him that he didn't put chili in his  
27 eyes and stop lying.

28 Q How did you deal with these two different explanations?

1 A At first I was mad because I was like, what happened to  
2 my child, why -- what's wrong with his eyes. But then I  
3 was -- I knew that, you know, I didn't think that nothing  
4 bad would happen. I just thought maybe it was an accident  
5 or something had happened to him. That's about it.

6 Q What was your reaction to Anthony saying it's not an  
7 accident, Angel put chilis in his eyes?

8 A I told him: What do you mean he put chili in your  
9 eyes? He wouldn't directly put chili in your eyes. You  
10 must have got chili or something. And me and Anthony were  
11 arguing back and forth, and that's when Angel got mad and he  
12 said: I'm not watching your kids anymore. He doesn't know  
13 how to behave. I told him not to grab the chili at the  
14 restaurant and he got it on his hands and he rubbed his eyes  
15 and started crying. And he said he had to take him to the  
16 rest room and wash his eyes out with water, and that's when  
17 they got irritated like that.

18 Q So you were arguing with your son Anthony?

19 A And Angel at the same time back and forth.

20 Q How did the argument end?

21 A Angel left mad. I told him, I said, you know, if you  
22 don't know how to take care of them or apparently you  
23 weren't watching them, you don't have to watch my kids  
24 anymore. And he was saying: I don't want to watch them  
25 anyway. And we started arguing back and forth and we left.

26 Q After he left, did you talk to the kids?

27 A Yes.

28 Q Did Anthony tell you anything?

1 A He just said that he wasn't lying, he was telling the  
2 truth.

3 Q Did Amanda say anything?

4 A Amanda didn't say anything. I asked her and she didn't  
5 want to talk about it. She said: I don't know, I'm not  
6 saying anything. Every time I asked her she just didn't say  
7 anything.

8 Q In your experience with her, was that unusual behavior  
9 for her?

10 A No.

11 MR. SCHROEDER: Your Honor, I'm going to object to  
12 that as vague. I also -- also it's not relevant, it's too  
13 general.

14 THE COURT: I'll sustain the objection.

15 Q (BY MS. MCKAY-MCCOY) What were your plans for treating  
16 Anthony? Did you put ointment on it or what did you do?

17 A No, I asked Angel what's the stuff around his eyes. He  
18 said he put some type of Vaseline around his eye so Anthony  
19 wouldn't irritate it anymore.

20 Q That who had put it?

21 A That Angel had put it on his eyes.

22 Q What treatment, if any, did you give?

23 A I left it alone, and I told him I was going to take him  
24 to the doctor in the morning because, you know, they looked  
25 really bad.

26 Q What time of evening was this?

27 A This was around -- it was already like seven o'clock.

28 Q Did you give them a bath that night?

1 A Yes, I did, before they went to sleep.

2 Q Is that their normal routine?

3 A Uh-huh, yes.

4 Q Which one did you bathe first; do you recall?

5 A I believe I bathed the baby first.

6 Q Junior?

7 A Junior first.

8 Q And in your routine, who do you bathe after Junior?

9 A Amanda and Anthony.

10 Q When you bathed Anthony, did you notice any injuries or  
11 marks apart from the ones around his eyes?

12 A I believe it was a bruise. I'm not sure if it was on  
13 his back or on his thigh.

14 Q Did you ask him about it?

15 A Yes, I asked him.

16 Q And what did he respond?

17 A He said that Angel had spanked him because he didn't  
18 behave.

19 Q Did he say in what way he hadn't behaved?

20 A No, I think it was because of the chili, about the  
21 chili in the eyes. I'm not even sure, I don't remember.

22 Q Did Anthony make any other statements to you while you  
23 were bathing him about him and Angel?

24 A No, just that he didn't want to go with him anymore.

25 Q What was your response?

26 A I told him, okay, he didn't have to go.

27 Q When you bathed Amanda, did you notice any unusual  
28 marks?



1 A I noticed what I thought was dirt on her cheeks. I  
2 tried to wash it off with the washcloth but it was two  
3 bruises.

4 Q What were the two bruises, where on the face?

5 A On her cheeks right here. Not the dimple area but  
6 right here in the middle of her cheek.

7 Q In the middle of her cheeks?

8 A Yeah, like when you squeeze someone's cheeks like this.

9 Q When they didn't wash off, did you ask her about that?

10 A I asked her and she said, oh, because he squeezes my  
11 checks too hard.

12 Q He meaning who?

13 A Angel.

14 Q Did you notice any other bruises or marks on her?

15 A She had a bruise on her thigh. I'm not sure what side  
16 it was.

17 Q Did you ask her about that?

18 A Yes, but she said she didn't know how it got there.

19 Q Did she make any statements to you concerning the  
20 defendant while you were bathing her?

21 A Yes, she did.

22 Q How did that happen?

23 A I had told her to wash up her private area, and she had  
24 started to washing up with soap and she had complained that  
25 it was burned -- it was irritating her. And I had asked  
26 her, I said: What's wrong? And she said: Well, sometimes  
27 when Angel gives me a bath or a shower, he'll stick his  
28 fingers up, I guess, she said to wash her real good on the

1       inside. And I was like, what? She says: I guess 'cause he  
2       had long fingernails or something or maybe it scratched her  
3       in the inside of her private part.

4       Q       What was your reaction?

5       A       I was just like shocked, I was stuck. I didn't know  
6       what to say, I was just like oh.

7       Q       Did she make any other statements to you concerning  
8       Angel while you were bathing her?

9       A       No, that's all she said.

10      Q       When you finished bathing the children, what did you do  
11      next?

12      A       I called -- I believe I called the police department.

13      Q       The Oakland Police Department?

14      A       Uh-huh.

15      Q       You were in Oakland at the time?

16      A       Yes, I was living in Oakland at the time.

17      Q       Why did you call the police?

18      A       For the statements that she had said about him washing  
19      her up with the soap and for the bruises right here on her  
20      cheek.

21      Q       Did a uniformed officer come out?

22      A       Yes, he did.

23      Q       More than one?

24      A       I believe only one came.

25      Q       Man, woman?

26      A       He was a man.

27      Q       Did he talk to the kids?

28      A       Yes, he did.

1     them into the bed, I tucked them -- tucked them in the bed.

2     Q     Did you talk to them about talking to the police?

3     A     Yes, I did.

4     Q     What did you tell them?

5     A     I had asked them why they didn't tell me sooner what  
6     was going on and they said that they were scared.

7     Q     Did both Amanda and Anthony tell you that?

8     A     No, Amanda did.

9     Q     What did Anthony say, do you recall?

10    A     He just said he didn't want to go with Angel anymore.

11    Q     This was as you were tucking them into bed?

12    A     Yes.

13    Q     Did you tell them anything else?

14    A     I told them that everything would be okay, and I tucked  
15    them into the bed and I gave them a kiss. And I told them  
16    thanks for telling what had happened and that nothing like  
17    that would ever happen to them again.

18    Q     At that time did they sleep in separate rooms?

19    A     No, they slept in the same room.

20    Q     Did they have bunk beds or side by side beds or what?

21    A     They had bunk beds.

22    Q     Who slept on top, Amanda or Anthony?

23    A     Anthony.

24    Q     When you tucked Anthony into bed in the top part of the  
25    bunk bed, did he say anything to you?

26    A     Actually they didn't want to sleep apart, they wanted  
27    to sleep together.

28    Q     That night?

1 A Uh-huh.

2 Q Did you allow them to sleep in the same bed?

3 A Yes, I did.

4 Q As you tucked Anthony into bed, did he say anything to  
5 you?

6 A No, he just said that he loved me and that he wasn't  
7 going to be scared 'cause he knows that there's -- I  
8 wouldn't let him, Angel, come around the kids anymore.

9 Q As you tucked Amanda into bed, did she say anything to  
10 you?

11 A She said that she was scared but I told her it was  
12 okay, that he wasn't going to touch her or anything. Not  
13 that he wasn't going to touch her but he wasn't going to be  
14 able to come around and visit them anymore. And I told her  
15 thank you for telling me and that if she ever had anything  
16 to tell me --

17 Q If she ever had any what?

18 A If she had anything, you know, ever to tell me that she  
19 could go ahead and tell me and I wouldn't be mad 'cause she  
20 had said that he was -- she had said that that he had said  
21 that if I had ever told that they had got spanked or  
22 anything that it would be my fault, and she was scared that  
23 they were going to take them away from me, I guess, the  
24 police.

25 Q Did you try to reassure her?

26 A I told her everything was going to be fine, that they  
27 would never take them away from me 'cause, you know, that it  
28 would be all right. And she had said that she didn't really

1 tell me I guess everything that was going on.

2 Q Do you remember as close as you can what she told you?

3 A I think she said something that she had said that she  
4 didn't tell me that he had -- that he -- made her.

5 THE COURT: Take your time.

6 THE WITNESS: That she had -- that he had made her  
7 drink his pee-pee milk.

8 Q (BY MS. McKAY-McCOY) When she said the word milk, what  
9 was your reaction?

10 A I was like -- I said what? What do you mean he made  
11 you drink his pee-pee milk, 'cause I just didn't understand.  
12 And she said, you know, that it's white stuff that comes out  
13 of his pee pee.

14 Q What was your reaction?

15 A I didn't know what to say. I was -- I just started  
16 crying 'cause she doesn't know about that. So then I told  
17 her it would be okay and I gave her a hug and I called the  
18 police again and they came out to the house.

19 Q Was it the same officer?

20 A It was the same officer that came and another officer  
21 came later.

22 Q Another officer or San Jose officer?

23 A They were Oakland officers.

24 Q Did they talk to the kids -- well, the first officer,  
25 the one who came first, and when he returned did he talk to  
26 the kids again?

27 A Yes, he did.

28 Q Were you again asked by him to leave?

1 A Yes, I went into the living room and he pulled Amanda  
2 to the dining room.

3 Q Could you hear what the kids were telling him in the  
4 dining room as you were in the living room?

5 A No.

6 Q Did he again ask you to join them?

7 A Yes, he asked me to tell him what Amanda had said.

8 Q Was that while Amanda was there?

9 A No, he had sent the kids into the room. He told them  
10 to get their clothes and get dressed.

11 Q So as the kids are in the room getting clothes and  
12 getting dressed, you're talking to the officer?

13 A Yes.

14 Q And the officer asked you what Amanda told you?

15 A Yes.

16 Q Did you tell him what Amanda told you?

17 A Yes.

18 Q After that did you and the kids and the officer all  
19 talk together?

20 A I don't believe we did.

21 Q What happened then?

22 A I believe the San Jose police officer had called the  
23 Oakland police and they said that they had wanted to take  
24 over the investigation and they wanted us transported to San  
25 Jose immediately. So they told me to get the kids ready and  
26 they transported us to San Jose.

27 Q Who took you to San Jose?

28 A A police officer.

1 A I think for about a day and a half, then they sent us  
2 home.

3 Q How did you get home?

4 A They gave me a bus ticket and I took the Greyhound and  
5 then I took a cab when I went home.

6 Q After Amanda first told you about this, after you -- I  
7 take it you were initially quite surprised?

8 A Uh-huh.

9 Q Did you try to question her or find out from her what  
10 had happened maybe in more detail?

11 A Yes, I did but she really didn't want to talk about it.

12 Q Where was that?

13 A At home.

14 Q Did she try to -- when she was willing to talk to you?  
15 Did she try to explain to you what happened or demonstrate  
16 what happened?

17 MR. SCHROEDER: Objection, Your Honor; assumes  
18 facts not in evidence.

19 THE COURT: Overruled.

20 Q (BY MS. McKAY-McCOY) Do you understand the question?

21 A Yes, I do. I had asked her what had happened and  
22 she -- she has a lot of Barbie dolls and I told her to show  
23 me what he did with the Barbies. So we got a girl and boy  
24 Barbie and she showed me what he did. I believe she showed  
25 the detectives that were doing the interview with her, I  
26 think she might have showed them too because they had  
27 Barbies and they were playing.

28 Q Where did she talk to you about the Barbies, was that



1 at home?

2 A That was at home.

3 Q Was that before you were taken to San Jose?

4 A No, that was afterwards, after everything was already  
5 over and they did the interview.

6 Q What did she demonstrate for you with the Barbie?

7 A The girl Barbie, I guess the mouth was on the male  
8 Barbie's penis and the boy Barbie would lay on top of the  
9 girl Barbie and move up and down, and the boy Barbie's mouth  
10 would go to the girl Barbie's vagina.

11 Q When Amanda was demonstrating this for you, what was  
12 your reaction?

13 MR. SCHROEDER: Objection.

14 THE COURT: Grounds?

15 MR. SCHROEDER: Relevance.

16 THE COURT: Sustained.

17 Q (BY MS. MCKAY-McCOY) How would you describe her  
18 demeanor? Was she happy, sad? How would you describe her?

19 A She was uncomfortable and she really didn't want to  
20 show me.

21 Q Is it you that asked her to show you with the Barbie  
22 dolls?

23 A Yes, I did.

24 Q Have you talked about it since then occasionally with  
25 her?

26 A Sometimes we talk about it 'cause I had asked her, you  
27 know, if you ever want to talk to me about something you can  
28 talk to me. And she says, no, it's okay, I really don't

1 Q And his nickname is Nots, right?

2 A Yes.

3 Q And when you were discussing this about Angel taking  
4 you to visit him, to visit Nots, were you married at that  
5 time?

6 A No, I wasn't.

7 Q You referred to him as your husband, that's why I was  
8 asking.

9 A No, I wasn't married back then.

10 Q Did you -- so did he take you over to visit your  
11 husband or --

12 A Yes, he did.

13 Q I'm going to refer to him as your husband because  
14 you're married now.

15 A Yes.

16 Q So he took you over to visit him?

17 A Yes, he did.

18 Q And do you remember where that was?

19 A It was either in -- it might have been Santa Rita,  
20 Dublin.

21 Q You don't remember going to Jamestown or someplace  
22 quite far away?

23 A Yes, he took me to Jamestown.

24 Q No, I'm sorry, I'm just talking about the first time.

25 A No, I think the first time it was either Santa Rita or  
26 North County. It was probably Santa Rita because buses  
27 don't go out that way.

28 Q You're saying he took you there. Are you saying the

1 Q But you didn't say that's not true?

2 A No, I didn't say that's not true.

3 Q And that was because you needed to be on that lease,  
4 right?

5 A I needed to be on the lease to have access to the  
6 storage because I didn't have my I.D.

7 Q So saying you were his wife made it mean you could do  
8 that?

9 A He said it, I didn't.

10 Q But you had asked him to come over there and help you  
11 get this all set up, hadn't you?

12 A What do you mean?

13 Q Get set up with the storage unit in Modesto?

14 A No, I asked him if he could give me a ride out there so  
15 I could get a storage for myself.

16 Q You're saying when you got over there you didn't have  
17 your purse. You had gone over just for the purpose of  
18 getting a unit and you didn't have any identification?

19 A I went all way out there, I left my I.D. at home but I  
20 had everything else with me.

21 Q So you're saying that there was absolutely no  
22 indication on your part that you kind of were interested in  
23 having a relationship with Angel, he just did all of these  
24 errands and took you to these places a long way away like  
25 Modesto, just did it as a favor and that was it?

26 A Yeah, he was my best friend.

27 Q Now, then, going back to talking to Amanda that night  
28 when you called the police, do you need a second?

1 another possible source, we should be able to go into that  
2 to raise that point. That's the reason I'm raising the  
3 issue.

4 I think it doesn't matter, it could have been two  
5 molests from two different people. That's a decision for  
6 the jury to make. Submitted.

7 THE COURT: The difficulty that the Court has with  
8 this matter is the timeliness of the motion. We had in  
9 limine motions at the beginning before evidence was  
10 presented. Clearly this evidence was known to you,  
11 Mr. Schroeder. And the complaining witness, Amanda, has  
12 already testified in this matter.

13 Now, she's nine years old now. She was I guess  
14 six years old at the time of this event. And it seems to me  
15 that one of the concerns that the Court should be  
16 addressing, and one of the issues that the Court must be  
17 concerned about is the traumatic effect of the experience of  
18 testifying before the Court on the minor in this case.

19 In the Court's mind if this issue had been raised  
20 in a timely fashion, the child would have been able to  
21 address these issues on the day that she actually appeared  
22 here in court, and would have been spared the trauma of  
23 coming back at another time to take the witness stand.  
24 She's now off the witness stand and back in her home in  
25 Oakland, and the Court is very reluctant to have her come  
26 back to face these issues and to retake the witness stand.

27 That being said, the other issue that concerns me  
28 is that indicia of credibility of the proffered testimony.

1 numerous reasons as to why you didn't think it was a good  
2 motion in the first place. So what I'm trying to clarify  
3 for the record is whether you're making the ruling based  
4 upon -- you're saying that I wasn't timely in raising the  
5 issue versus effectively the merits of the issue itself  
6 because my position would be --

7 THE COURT: I think I also addressed the merits,  
8 Mr. Schroeder.

9 MR. SCHROEDER: That's what I want clear for the  
10 record. If the Court is saying even if I raised this issue  
11 at the time that you say that I should have raised it, I  
12 mean the merits still would have been there.

13 THE COURT: The Court believes that the merits are  
14 not there.

15 MR. SCHROEDER: That's what I'm trying to clarify.

16 THE COURT: Yes.

17 MR. SCHROEDER: Even if I raised the issue in  
18 limine, you still would have ruled against me based upon  
19 what you've elucidated here just now.

20 THE COURT: I think the issue is clearer to the  
21 court at this point because of the timeliness or lack  
22 thereof of the motion.

23 MR. SCHROEDER: I'm not trying to belabor the  
24 point, Your Honor, but I think it matters in any kind of  
25 appeal issue because what the Court is saying your position  
26 is, I didn't raise it in a timely fashion, which I don't  
27 believe to be the case.

28 THE COURT: Mr. Schroeder, I'm really not

1 reopening this for argument.

2 MR. SCHROEDER: I'm not arguing for the Court, I'm  
3 trying to get the record made with respect to this.

4 MR. SCHROEDER: Thank you.

5 THE COURT: Do you have any response?

6 MS. McKAY-McCOY: No, submitted. Thank you.

7 THE COURT: I'm going to deny the request for the  
8 reasons stated under 782.

9 THE DEFENDANT: Do I have any right to a defense?

10 THE COURT: For the reasons that I've indicated,  
11 and that will conclude this matter.

12 The court will be in recess. We'll ask the jury  
13 to come up.

14 (Whereupon, a brief recess was taken.)

15 THE COURT: The Court will return to the matter of  
16 People versus Angel Alvarez. The record should reflect the  
17 defendant is present in court with his attorney. The People  
18 are present. The jury is present with two alternates.

19 Good morning. And the record would show Mr. Anam  
20 has been returned to the witness stand.

21 Mr. Schroeder, if you would like to continue your  
22 examination.

23 MR. SCHROEDER: Thank you, Your Honor.

24 **DIRECT EXAMINATION (CONTINUED)**

25 Q (BY MR. SCHROEDER) Mr. Anam, yesterday I asked you  
26 about going to the motel in Newark.

27 A Yes.

28 Q Do you recall that?

1 children at the flower shop because it's so close to the  
2 street because it's close to a parking lot. I always tend  
3 to tell them not to run around. They like to run around,  
4 they like to chase each other.

5 There's also a lot of, I don't know what you call it, I  
6 should have brought some, they're white rocks used as a  
7 decorative thing on the floor, it surrounds the flower shop.  
8 If you step on these rocks, you can slip and fall. And the  
9 children were constantly slipping and falling, but these are  
10 tough little kids, they just stand up and keep running.

11 Q Now, did you try to get them to stop running around?

12 A Yes, I did. This particular weekend Ruby had  
13 specifically told them -- I don't know if I should quote her  
14 or not, because maybe that's hearsay. I don't know. But  
15 she -- I told her: I can't control the kids at the flower  
16 shop. She said: Just grab your belt and whup their asses.  
17 I go: I'm not their dad. So what, they got to respect you.  
18 Grab your belt and whup their asses.

19 Q Did you give them a spanking at the flower shop on this  
20 Saturday we're talking about?

21 A Yes, I did.

22 Q Could you describe how -- first of all, how did it come  
23 up that you decided to do it?

24 A I remember some events happening that weekend, I can't  
25 really place which day they happened. Most of the weekends  
26 were all the same to me. I know I had spanked Amanda for  
27 spitting in her soup as kind of her way of telling me she's  
28 not going to eat it because she wanted something else. And



1 I had grabbed my belt and I spanked her. I also had spanked  
2 Anthony for playing with scissors. It was during the time I  
3 was making a sale to a lady. Amanda was assisting me. He  
4 ran into the shop, momentarily grabbed the scissors and was  
5 playing with them.

6 Q Okay.

7 MR. SCHROEDER: I'm going to ask these be marked  
8 defense next in order, I think it's B.

9 THE CLERK: C.

10 THE COURT: C.

11 MR. SCHROEDER: C, I'm sorry.

12 (Whereupon, Defendant's Exhibit No. C was marked for  
13 identification only.)

14 Q (BY MR. SCHROEDER) I'm going to show you what's been  
15 marked Defense C. Do you recognize those scissor -- they're  
16 obviously scissors; do you recognize them?

17 A Yes.

18 Q And where are those from?

19 A From the flower shop.

20 Q Now, you said you had a problem, you started to make  
21 reference to a problem with Anthony with scissors. What  
22 specifically happened with that?

23 A He would watch me use the scissors frequently. I  
24 needed the scissors to cut cellophane wrap to wrap the  
25 flowers. Being a child in his exploratory stage, he likes  
26 to imitate adults. He would grab the scissors and try to  
27 cut cellophane with them or other objects.

28 Q Okay. Now, did you express any concern to him about

1 his playing with the scissors?

2 A Yes, I did.

3 Q What did you say?

4 A On that particular time when the lady came to purchase  
5 the flowers, she had given me the change and the money back.  
6 I turned around to go to the register to place them in the  
7 register and I found him cutting little pieces of string  
8 from his jeans in his crotch area. There were little -- I  
9 guess the jeans were worn out. For instance, little pieces  
10 of string coming out and he was attempting to cut them with  
11 the scissors.

12 Q Did that alarm you?

13 A Yes, it did.

14 Q What did you do?

15 A I yelled: Well, Anthony what are you doing? And when  
16 he looked up, I -- I don't know if he was playing with me  
17 but he says I have scissors and he was doing this with them,  
18 opening them and they were getting very close to his face.

19 Q So what did you do?

20 A I grabbed his hand, yanked the scissors out and put --  
21 actually I dropped the money. I sat him down, put the  
22 scissors back up because we have some little nails that we  
23 put the scissors up there. This one was left on the table  
24 after I had cut the cellophane. I grabbed my belt and  
25 spanked him twice and told him not to play with the  
26 scissors. That was the last time I told him.

27 Q The belt you refer to, was that something you were  
28 wearing at that time?

1 We'll be in recess until five minutes past eleven.

2 (Whereupon, the mid-morning recess was taken.)

3 THE COURT: The Court will return to the matter of  
4 People versus Angel Alvarez. The record should reflect the  
5 defendant is present in court with his attorney. The People  
6 are present. And the jury with two alternates are also  
7 present.

8 I'll ask Mr. Alvarez to return to the witness  
9 stand.

10 And, Mr. Schroeder, if you would like to continue  
11 your direct examination.

12 MR. SCHROEDER: Thank you, Your Honor.

13 Q (BY MR. SCHROEDER) Okay. Now, before we took the  
14 break, you had earlier described Anthony playing with the  
15 scissors?

16 A Yes.

17 Q Do you remember looking back on that time, do you  
18 remember specifically which day he did that?

19 A No.

20 Q So is it fair to say you basically just remember it  
21 happening, you don't remember which day?

22 A I remember it happening that weekend, Saturday or  
23 Sunday.

24 Q And in terms of the spanking that you just described to  
25 us earlier, do you remember which day that occurred on?

26 A It occurred when he played with the scissors.

27 Q So therefore you don't know which day specifically?

28 A No, but I'm sure it's that weekend.

1 A No.

2 Q Now, as I understand it then from what we've already  
3 heard, the next day you were awakened by Mr. Ejaz knocking  
4 on the door of the motel?

5 A More like pounding.

6 Q Once you were awakened and he was there, how long do  
7 you think it was till you left with the children to go to  
8 Oakland?

9 A Within a few minutes. I realized this was an important  
10 shipment for him. He had to go to South Korea. So I woke  
11 up the kids, woke them and placed them in the van where the  
12 blankets were, turned in the key, got in the van, took off.  
13 I would say ten minutes.

14 Q Did you get ahold of Ruby before you left the motel?

15 A No.

16 Q So you didn't know one way or the other whether she was  
17 there when you were heading up to Oakland?

18 A I was hoping she was going to be home.

19 Q But you didn't know?

20 A Didn't know.

21 Q So now, were you able to drive in the diamond lane  
22 because you had the children?

23 A Yeah.

24 Q About what time roughly would you say you got to  
25 Oakland?

26 A Around 8:20.

27 Q And once you arrived there, did you -- did you meet  
28 with Ruby at that time?

1 A Yes, knocked on the door, Ruby opened the door.

2 Q Okay. And once you saw her, did you get into any kind  
3 of an argument with her?

4 A Yeah. There were a few issues that I wanted to clear  
5 up with you. First of all, where were you last night, I  
6 tried to get ahold of you. We talked about that and --

7 Q Did you in any way express feelings about your  
8 involvement with the kids and what your feelings were with  
9 the way you were being treated by her with respect to that?

10 A Yes, I told her, you know I missed a class last night  
11 because of you, these kids. I've done a lot of things for  
12 you guys and you still on top of that you go and marry this  
13 guy. And she got angry. She said: How do you know that?  
14 She glared at Amanda. Amanda tends to talk a lot. And we  
15 had basically an argument about how I found out certain  
16 things, an argument about the fact that she was missing that  
17 previous night and I had to miss a class. And I told her:  
18 I'm not going to do that anymore. The Quintanillas don't  
19 want the children at the house no more, that's it. As far  
20 as the \$200 you want for the party this weekend, forget it  
21 because this is crazy. It's getting out of hand, I ain't  
22 your nanny. I'm trying to get with you, I'm not trying to  
23 look for employment. I don't need this.

24 Q How would you describe the discussion? Was it totally  
25 normal tones like we're talking in here or was it argument?

26 A No.

27 THE COURT: Let him finish the question, please.

28 Q (BY MR. SCHROEDER) Let me finish. Okay?

1 Q And you reprimanded him?

2 A Yes, I did.

3 Q Did you tell Ruby that?

4 A Yes, I did.

5 Q When?

6 A On Sunday.

7 Q Why?

8 A Ruby always wants to know how the kids are doing, see  
9 how I'm handling them.

10 Q What was her response when you said he was cutting  
11 threads off his pants with the scissors?

12 A Did you whup his ass.

13 Q What was your response?

14 A I said no.

15 Q Did you explain to Officer Rosengren, you know, all  
16 this penis thing, it's because Anthony was cutting threads  
17 off his pants with scissors; did you tell Officer Rosengren  
18 that?

19 A No.

20 Q The reason why not is?

21 A He didn't ask.

22 Q Had you punished either of these kids with a belt  
23 before?

24 A Not until that weekend, no.

25 Q Had you spanked them?

26 A Yes, I did.

27 Q When you spanked Amanda where?

28 A On her butt.

1 Q Where were you in the van, floral shop, where?

2 A The flower shop.

3 Q And where was Anthony when you would spank her in the  
4 flower shop?

5 A In the restaurant.

6 Q Did you ever make Anthony go outside and shut the door  
7 and spank Amanda behind the closed door?

8 A No.

9 Q So there's absolutely no reason for Anthony to say that  
10 Angel makes me go outside and he shuts the door and then  
11 spansks Amanda?

12 A I think you misunderstood him. I told him to sit down,  
13 wait here. I left the restaurant and shut the door behind  
14 me from the restaurant and went to the flower shop. I  
15 didn't think it was appropriate to spank a child in a public  
16 restaurant.

17 Q When you hit yourself with a belt to demonstrate for  
18 us, that didn't hurt, did it?

19 A No.

20 Q It didn't leave a mark?

21 A No.

22 Q Is that exactly how hard you hit Amanda and Anthony?

23 A Yes.

24 Q So your testimony is you never hit Amanda or Anthony  
25 hard enough to leave a mark?

26 A That's correct.

27 Q So there would be absolutely no reason for them to be  
28 very upset because you hurt them?



1 Q When was that?

2 A A long time ago.

3 Q What was your response?

4 A No.

5 Q Why?

6 A I don't find him personally attractive.

7 Q What was his reaction when you said no?

8 A He would always tell me: Oh, come on, you have a loser  
9 husband and stuff like that.

10 Q When did you marry your husband?

11 A In July of I believe '96.

12 Q Was he in prison at the time?

13 A Yes, he was.

14 Q And how did you get there to marry him?

15 A Angel gave me a ride.

16 Q Was he present at the ceremony?

17 A No.

18 Q Did you talk about it on the way home, how it went?

19 A Yes.

20 Q Where did you keep your marriage license?

21 A Excuse me?

22 Q Where do you keep your marriage license?

23 A At my house.

24 Q Where?

25 A On the wall in a little picture frame.

26 Q When did you put it up in a little picture frame?

27 A Probably about I think a month and a half after I got  
28 it.

1 UNDER OATH IN THESE PROCEEDINGS.

2 COULD YOU STATE YOUR FULL NAME AND SPELL YOUR LAST  
3 NAME FOR THE RECORD?

4 THE WITNESS: E-J-A-Z; MIDDLE INITIALS, U-L; LAST  
5 NAME, A-N-A-M, ANAM.

6 FURTHER REDIRECT EXAMINATION

7 BY MR. SCHROEDER:

8 Q MR. ANAM, I AM GOING TO REFER YOU BACK TO THE TIME  
9 THAT WE TALKED ABOUT WHEN YOU WERE ON THE STAND BEFORE,  
10 RELATED TO RIGHT AROUND THE TIME THAT ANGEL WAS TAKEN INTO  
11 CUSTODY, HE WAS IN JAIL?

12 A YES.

13 Q AND IN THE COURSE OF HIM BEING IN JAIL, DID YOU PLACE  
14 ANY TELEPHONE CALLS FOR HIM?

15 A YES.

16 Q AND WHY DID YOU DO THAT?

17 A BECAUSE HE COULD ONLY MAKE LOCAL CALLS FROM THERE.

18 Q AND DID HE ASK YOU TO ASSIST HIM IN SOME WAY TO CALL  
19 SOMEBODY ELSE?

20 A YES.

21 Q AND WHO WAS HE ASKING YOU TO CALL?

22 A HE WAS ASKING ME TO CALL HIS FAMILY AND HIS -- THE  
23 LADY NAMED RUBY.

24 Q IN THE COURSE OF YOUR BUSINESS, DO YOU HAVE REASON TO  
25 MAINTAIN YOUR -- KEEP YOUR TELEPHONE BILLS?

26 A YES.

27 Q IS THAT MAINLY FOR TAX PURPOSES?

28 A YES.

1 A A TELEPHONE BILL.

2 Q IS THAT YOUR TELEPHONE BILL?

3 A YES.

4 Q AND DIRECTING YOUR ATTENTION TO THAT BILL, AS TO --  
5 DOES IT REFLECT ANY CALLS MADE ON NOVEMBER 21, 1996?

6 A YES.

7 Q ON THAT BILL, DOES THAT IN ANY WAY INDICATE SOMETHING  
8 THAT YOU RECALL HAPPENING WHEN YOU WERE MAKING TELEPHONE  
9 CALLS FOR ANGEL ALVAREZ?

10 A YES.

11 Q WHAT DOES IT SHOW?

12 A IT SHOWS THERE WERE FOUR CALLS MADE.

13 Q DO YOU REMEMBER MAKING FOUR CALLS?

14 A YES.

15 Q CAN YOU TELL US BASICALLY WHAT HAPPENED WHEN YOU MADE  
16 THE CALL -- THE FIRST THREE CALLS?

17 A EVERY TIME I CALLED, THE PERSON ON THE OTHER SIDE HUNG  
18 UP THE PHONE.

19 Q WHEN YOU CALLED, WHO -- NOT THE PARTY THAT YOU WERE  
20 CALLING, BUT WHO SPOKE WHEN YOU PLACED THE CALL FROM, IN  
21 FACT, YOUR END OF THE CALL, WAS IT YOU, OR ANGEL?

22 A ANGEL.

23 Q ON THE FOURTH CALL, THE ONE THAT IS NUMBER 14 ON THE  
24 LIST, DID YOU DO ANYTHING SPECIAL WITH RESPECT TO THE PHONE  
25 CALL ON THAT FOURTH CALL?

26 A YES.

27 Q WHAT DID YOU DO?

28 A I HAD ASKED, WHEN HE FINALLY CONNECTED, WHEN HE MADE

1 IT TO CONNECT THE CALL AND THEY STARTED HAVING THE  
2 CONVERSATION, I ASKED ANGEL AT THAT TIME, WOULD YOU LIKE ME  
3 TO GET OFF THE LINE, SO THAT WAY I CAN GO ATTEND TO MY  
4 BUSINESS? HE SAID, NO, PLEASE, STAY ON THE PHONE, BECAUSE  
5 PREVIOUSLY SHE HAD HUNG UP ALREADY THREE TIMES. SO, HE  
6 SAID, PLEASE, STAY ON THE LINE, IF SHE HANGS UP, YOU CAN  
7 DIAL THE PHONE NUMBER AGAIN.

8 Q DO YOU REMEMBER, MORE OR LESS, BASICALLY WHAT  
9 MR. ALVAREZ WAS SAYING IN THAT TELEPHONE CONVERSATION?

10 A YES.

11 Q AND WHAT WAS THE NATURE OF THAT?

12 MS. MCKAY-MCCOY: OBJECTION. HEARSAY.

13 MR. SCHROEDER: NOT FOR THE TRUTH, SIMPLY THAT THE  
14 STATEMENT WAS MADE.

15 THE COURT: SUSTAIN THE OBJECTION.

16 Q (BY MR. SCHROEDER) WITH RESPECT TO THE PARTY ON THE  
17 OTHER END, DID THAT PARTY RESPOND TO ANY OF THE THINGS THAT  
18 MR. ALVAREZ SAID?

19 A YES.

20 Q WAS THERE ANY PARTICULAR RESPONSE THAT STICKS OUT IN  
21 YOUR MIND?

22 A YES.

23 Q WHAT WAS THAT? WHAT WAS SAID?

24 A FROM THE OTHER SIDE?

25 Q YES. THE THING THAT STICKS OUT IN YOUR MIND, WHAT WAS  
26 SAID?

27 A SHOULD I STATE ON THE RECORD?

28 Q YOU CAN SAY EXACTLY WHAT WAS SAID. YOU ARE STATING

1 WHAT SOMEBODY ELSE SAID. ARE YOU RELUCTANT TO USE THE  
2 WORDS?

3 A YES, I AM.

4 Q AND WE NEED TO KNOW WHAT THEY ARE IN COURT. YOU ARE  
5 NOT SAYING IT YOURSELF.

6 THE COURT: GO AHEAD AND ANSWER THE QUESTION.

7 THE WITNESS: SHE WAS SAYING TO ANGEL, THAT, YOU  
8 KNOW, YOU SHOULD NOT HAVE FUCKED WITH ME, AND THIS IS WHAT  
9 YOU GET FOR MESSING WITH ME.

10 Q (BY MR. SCHROEDER) I NOTICE ON THE LISTING OF THE  
11 PHONE BILL THAT THE -- IT SHOWS THAT THE CONVERSATION LASTED  
12 EIGHT MINUTES. DOES THAT FIT -- DO YOU HAVE A MEMORY OF  
13 THERE BEING TALKING BACK AND FORTH FOR MOST OF THAT PERIOD  
14 OF TIME?

15 A NOT TOO MUCH, JUST A LITTLE BIT.

16 Q AS FAR AS YOUR MEMORY OF IT?

17 A YES.

18 Q DID ANGEL IN ANY WAY SAY ANYTHING TO YOU ABOUT WHAT  
19 YOU SHOULD SAY ABOUT THIS TELEPHONE CONVERSATION?

20 A NO.

21 MR. SCHROEDER: NO FURTHER QUESTIONS.

22 THE COURT: CROSS EXAMINATION.

23 FURTHER RECROSS-EXAMINATION

24 BY MS. MCKAY-MCCOY:

25 Q DID SHE SAY ANYTHING ELSE?

26 A NO.

27 Q YOU MEAN, THAT'S ALL SHE SAID FOR EIGHT MINUTES, OR  
28 THAT'S ALL YOU REMEMBER?

1 A NO.

2 Q SHE DID NOT SOUND UPSET AT ALL TO YOU?

3 A NO.

4 Q DID THE DEFENDANT SOUND, THE TENOR OF HIS VOICE, DID  
5 HE SOUND UPSET TO YOU AT ALL?

6 A YES.

7 Q DURING THIS EIGHT MINUTES, CAN YOU REMEMBER ANYTHING  
8 ELSE THAT SHE SAID, OTHER THAN WHAT YOU HAVE ALREADY TOLD  
9 US?

10 A NO.

11 Q NOTHING ELSE AT ALL?

12 A NO.

13 MS. MCKAY-MCCOY: THANK YOU.

14 THE COURT: REDIRECT EXAMINATION, MR. SCHROEDER?

15 FURTHER REDIRECT EXAMINATION

16 BY MR. SCHROEDER:

17 Q WHEN YOU SAY SHE DID NOT SOUND UPSET, OR SHE DID NOT  
18 HAVE VERY MUCH TO SAY, DID YOU THINK THAT THE -- WHEN SHE  
19 RESPONDED BY SWEARING LIKE THAT, SAYING THAT'S WHAT YOU GET  
20 FOR FUCKING WITH ME, DID YOU THINK THAT SOUNDED LIKE  
21 SOMEBODY WHO WAS JUST TALKING IN NORMAL --

22 MS. MCKAY-MCCOY: OBJECTION. SPECULATION AND  
23 VAGUE.

24 THE COURT: SUSTAINED.

25 Q (BY MR. SCHROEDER) DID THE FACT THAT THERE WAS STRONG  
26 LANGUAGE LIKE THAT USED, DID THAT -- WHAT DID YOU THINK  
27 ABOUT THAT AS FAR AS THE NATURE OF THE CONVERSATION?

28 A SHOULD I ANSWER YES OR NO, OR EXPLAIN?

1 THE COURT: GO AHEAD, EXPLAIN.

2 THE WITNESS: BEING THAT I WAS ON THE PHONE AND I  
3 WAS THINKING THAT THIS LADY SHOULD BE UPSET ABOUT WHAT  
4 HAPPENED TO HER CHILDREN, BUT SHE DID NOT SOUND LIKE THAT,  
5 WHATSOEVER. SHE DID NOT EVEN MENTION THE CHILDREN ON THE  
6 PHONE CALL.

7 Q (BY MR. SCHROEDER) SO, WHEN YOU SAY SHE DID NOT SOUND  
8 UPSET, IS THAT REFERRING THEN TO WHAT YOU JUST SAID ABOUT  
9 NOT MENTIONING THE CHILDREN?

10 A YES.

11 Q DID YOU THINK THAT THE RESPONSE OF, THAT'S WHAT YOU  
12 GET FOR FUCKING WITH ME, SOUNDED AT ALL LIKE AN UPSET  
13 RESPONSE? I DON'T MEAN NECESSARILY THE TONE, BUT THE USE OF  
14 THE PHRASE?

15 MS. MCKAY-MCCOY: OBJECTION. SPECULATION AND  
16 VAGUE.

17 THE COURT: SUSTAINED.

18 MR. SCHROEDER: NO FURTHER QUESTIONS.

19 RECROSS-EXAMINATION

20 BY MS. MCKAY-MCCOY:

21 Q WHY WERE YOU LISTENING IN?

22 A BECAUSE HE HAD ASKED ME TO STAY ON THE PHONE.

23 Q DID YOU INTRODUCE YOURSELF TO HER, OR EAVESDROP?

24 A NO, SHE KNEW I WAS ON THE PHONE.

25 MR. SCHROEDER: OBJECTION TO THE USE OF THE WORD,  
26 "EAVESDROP."

27 THE COURT: OBJECTION OVERRULED. I THINK IT IS  
28 USED IN NORMAL PARLANCE. GO AHEAD.



1 Q (BY MS. MCKAY-MCCOY) DID YOU TELL HER THAT YOU WERE  
2 ON THE LINE?

3 A SHE HEARD ME ON THE PHONE WHILE I WAS TALKING.

4 Q DID YOU TELL HER THAT YOU WERE ON THE LINE?

5 A NO, I DID NOT TELL HER. I DID NOT HAVE A CONVERSATION  
6 WITH HER WHATSOEVER.

7 Q DID YOU TELL HER WHO YOU WERE?

8 A NO.

9 Q YOU SIMPLY SPOKE TO ANGEL AFTER SHE PICKED UP THE  
10 PHONE?

11 A NO, ANGEL STARTED THE CONVERSATION.

12 Q DID YOU JOIN THE CONVERSATION?

13 A TO INTERRUPT ANGEL, SAYING, I AM GOING TO GET OFF THE  
14 LINE RIGHT NOW SO YOU GUYS CAN TALK.

15 Q BUT YOU DID NOT GET OFF THE PHONE?

16 A BECAUSE HE ASKED ME NOT TO.

17 Q WHY WOULD YOU SAY, I AM GETTING OFF THE LINE SO YOU  
18 GUYS CAN TALK?

19 A NO, LIKE PUTTING THE PHONE DOWN AND WALKING AWAY,  
20 BECAUSE I AM THE ONE CONNECTING THE CALLS.

21 Q DID YOU PUT THE PHONE DOWN AND WALK AWAY?

22 A NO, BECAUSE I ASKED HIM FIRST, I AM GOING TO DO THAT,  
23 SO YOU GUYS CAN TALK, AND HE ASKED ME NOT TO.

24 Q WHAT DID YOU SAY ON THE LINE AFTER THE WOMAN PICKED UP  
25 THE PHONE?

26 A I DID NOT SAY NOTHING.

27 Q IF YOU DID NOT SAY ANYTHING, HOW WOULD SHE KNOW THAT  
28 YOU WERE ON THE LINE LISTENING IN?

1 LISTENING IN TO SOMEBODY ELSE'S CONVERSATION?

2 A NO, BECAUSE I KNEW THE CONVERSATION WOULD NOT LAST  
3 LONG, BECAUSE SHE HAD ALREADY PREVIOUSLY HUNG UP THREE  
4 TIMES.

5 Q WHY WERE YOU WILLING TO DO THIS FAVOR FOR THE  
6 DEFENDANT?

7 A BECAUSE HE CANNOT MAKE LONG DISTANCE CALLS FROM THERE.

8 MS. MCKAY-MCCOY: THANK YOU. NOTHING FURTHER.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. SCHROEDER:

11 Q ONE QUESTION. WERE THERE ANY FEMALES AT YOUR  
12 RESIDENCE THAT SPOKE ON THE TELEPHONE?

13 A NO.

14 Q WERE THERE ANY FEMALES AT YOUR RESIDENCE AT ALL WHEN  
15 THESE CALLS WERE BEING MADE?

16 A NO.

17 MR. SCHROEDER: THANK YOU. NO FURTHER QUESTIONS.

18 THE COURT: MS. MC COY?

19 MS. MCKAY-MCCOY: THANK YOU, NO.

20 THE COURT: COUNSEL, COULD YOU APPROACH AND BRING  
21 THAT EXHIBIT?

22 (WHEREUPON, THE ATTORNEYS APPROACH THE BENCH AND A  
23 DISCUSSION WAS HAD.)

24 THE COURT: YOU MAY STEP DOWN. THANK YOU. MAY  
25 THE WITNESS BE EXCUSED?

26 MR. SCHROEDER: YES.

27 MS. MCKAY-MCCOY: YES.

28 THE COURT: MY UNDERSTANDING IS THAT THE DEFENSE

1 EVIDENCE OUTSIDE OF THE COURTROOM.

2 COURT WILL BE IN RECESS. THANK YOU.

3 (RECESS.)

4 THE COURT: COURT WILL RETURN TO THE MATTER OF THE  
5 PEOPLE VERSUS ANGEL ALVAREZ. RECORD SHOULD REFLECT THE  
6 DEFENDANT IS PRESENT IN COURT, WITH HIS ATTORNEY, AND THE  
7 PEOPLE ARE PRESENT. THE JURY IS PRESENT, WITH THE TWO  
8 ALTERNATES.

9 WE DO HAVE A COUPLE STIPULATIONS THAT NEED TO BE  
10 READ INTO THE RECORD. AS YOU WILL RECALL, STIPULATIONS ARE  
11 AGREEMENTS BETWEEN THE ATTORNEYS THAT YOU ARE TO ACCEPT AS  
12 HAVING BEEN CONCLUSIVELY PROVEN IN THIS TRIAL.

13 MR. SCHROEDER.

14 MR. SCHROEDER: YES, YOUR HONOR. BEFORE I READ  
15 THAT, I DID NOT MOVE IN DEFENSE H, PHONE RECORDS, IN  
16 EVIDENCE. THEY WERE MARKED, BUT NOT MOVED IN.

17 MS. MCKAY-MCCOY: NO OBJECTION.

18 THE COURT: ALL RIGHT. H IS ADMITTED IN EVIDENCE  
19 (DEFENSE EXHIBIT H, RECEIVED IN EVIDENCE.)

20 MR. SCHROEDER: FIRST STIPULATION I WILL READ IS  
21 THE ONE I MADE A MISTAKE ON YESTERDAY. THAT IS THE  
22 FOLLOWING; FROM NOVEMBER 20, 1996, UNTIL JANUARY 29, 1997,  
23 ANGEL ALVAREZ WAS IN CUSTODY IN SANTA CLARA COUNTY JAIL.

24 DURING THAT TIME HE WAS UNDER THE CARE OF THE JAIL  
25 MEDICAL STAFF. HE WAS SEEN BY THE STAFF ON NINE OCCASIONS.  
26 ANY PERSON INCARCERATED IN THE SANTA CLARA COUNTY JAIL HAS  
27 THE SANTA CLARA VALLEY MEDICAL CENTER FOR MEDICAL CARE WHEN  
28 NEEDED.

1 DURING THE TIME OF INCARCERATION SAID MEDICAL  
2 RECORDS CONTAINED NO REPORT BY ANGEL ALVAREZ, OR THE VALLEY  
3 MEDICAL CENTER STAFF, OF PHYSICAL SYMPTOMS OF ANY KIND.

4 THE SECOND STIPULATION IS, PURSUANT TO  
5 INVESTIGATION OF THIS CASE, SAN JOSE POLICE DEPARTMENT  
6 SEIZED VARIOUS ITEMS FROM ANGEL ALVAREZ'S VAN. INCLUDED ARE  
7 ITEMS THAT HAVE BEEN MARKED AS DEFENSE EXHIBITS D, E, F AND  
8 G. THESE ITEMS HAVE CONTINUOUSLY REMAINED IN POLICE CUSTODY  
9 SINCE THEIR SEIZURE BY THE POLICE AFTER ANGEL ALVAREZ'S  
10 ARREST.

11 ON APRIL 15, 1997, CRIMINALIST, KATHY BENJAMIN, OF  
12 THE SANTA CLARA CRIME LABORATORY, EXAMINED DEFENSE EXHIBIT  
13 G, THE UNDERWEAR, AND DEFENSE EXHIBIT E, THE DINOSAUR  
14 SLEEPING BAG, AND DID NOT DETECT THE PRESENCE OF SEMEN.

15 THANK YOU, YOUR HONOR.

16 THE COURT: ALL RIGHT, VERY WELL.

17 LADIES AND GENTLEMEN, I AM GOING TO INSTRUCT YOU  
18 ON THE LAW THAT APPLIES TO THIS CASE, AND YOU HAVE BEEN  
19 PROVIDED WITH COPIES OF THE JURY INSTRUCTIONS.

20 BEFORE I START READING THESE INSTRUCTIONS, LET ME  
21 JUST INDICATE TO YOU THAT THE INSTRUCTIONS I AM GIVING TO  
22 YOU HAVE BEEN PROVIDED TO YOU IN WRITTEN FORM FOR YOUR  
23 DELIBERATIONS. YOU MAY TAKE NOTES ON THE INSTRUCTION'S  
24 FORM. THEY MAY NOT LEAVE THE COURTHOUSE. YOU MAY NOT TAKE  
25 THEM HOME AT NIGHT AND STUDY THEM.

26 YOU WILL FIND THAT THE INSTRUCTIONS MAY BE TYPED,  
27 PRINTED OR HANDWRITTEN. PORTIONS MAY HAVE BEEN ADDED OR  
28 DELETED. YOU MUST DISREGARD ANY DELETED PART OF AN

1 THE TERM FORCE MEANS PHYSICAL FORCE THAT IS  
2 SUBSTANTIALLY DIFFERENT FROM OR SUBSTANTIALLY GREATER THAN  
3 THAT NECESSARY TO ACCOMPLISH THE LEWD ACT ITSELF.

4 THE TERM DURESS MEANS A DIRECT OR IMPLIED THREAT OF  
5 FORCE, VIOLENCE, DANGER, HARDSHIP, OR RETRIBUTION,  
6 SUFFICIENT TO COERCE A REASONABLE PERSON OF ORDINARY  
7 SUSCEPTIBILITIES TO, ONE, PERFORM AN ACT WHICH OTHERWISE  
8 WOULD NOT HAVE BEEN PERFORMED; OR, TWO, ACQUIESCE IN AN ACT  
9 TO WHICH ONE OTHER WOULD NOT HAVE SUBMITTED. THE TOTAL  
10 CIRCUMSTANCES, INCLUDING THE AGE OF THE VICTIM AND THEIR  
11 RELATIONSHIP TO DEFENDANT, ARE FACTORS TO CONSIDER IN  
12 APPRAISING THE EXISTENCE OF DURESS.

13 IN ORDER TO PROVE THIS CRIME, EACH OF THE FOLLOWING  
14 ELEMENTS MUST BE PROVED;

15 1. A PERSON TOUCHED THE BODY OF A CHILD;  
16 2. THE CHILD WAS UNDER 14 YEARS OF AGE;  
17 3. THE TOUCHING WAS DONE WITH THE SPECIFIC INTENT TO  
18 AROUSE, APPEAL TO, OR GRATIFY THE LUST, PASSIONS OR SEXUAL  
19 DESIRES OF THAT PERSON OR THE CHILD.

20 4. THE TOUCHING WAS DONE BY THE USE OF FORCE,  
21 VIOLENCE, DURESS, MENACE OR FEAR OF IMMEDIATE AND UNLAWFUL  
22 INJURY ON THE CHILD OR ANOTHER PERSON.

23 IF YOU ARE NOT SATISFIED BEYOND A REASONABLE DOUBT  
24 THAT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED, YOU MAY  
25 NEVERTHELESS CONVICT HIM OF ANY LESSER CRIME IF YOU ARE  
26 CONVINCED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS  
27 GUILTY OF THE LESSER CRIME. THE CRIME OF A LEWD AND  
28 LASCIVIOUS ACT ON A CHILD IS LESSER TO THAT OF FORCIBLE LEWD

1 GOOD AND THEY BEHAVE, AND THEY DO WHAT THEY ARE TOLD, GOOD  
2 THINGS WILL HAPPEN, AFFECTION, PRAISE, PETS, PATS, HUGS. IF  
3 THEY ARE BAD, DISOBEDIENT, BAD THINGS WILL HAPPEN, THINGS  
4 THAT ARE EMBARRASSING, PAINFUL AND SCARY, LIKE PUNISHMENT.

5 YOU KNOW WHAT SEX IS? EMBARRASSING, PAINFUL AND  
6 SCARY. IT IS OBVIOUSLY PUNISHMENT. WHAT IS THE KID  
7 SUPPOSED TO THINK. BAD CONSEQUENCES, BAD BEHAVIOR. I HAVE  
8 DONE SOMETHING WRONG. WHAT HAVE I DONE? I KNOW IT IS  
9 WRONG. THAT THIS WOULD NOT BE HAPPENING TO ME UNLESS IT  
10 WERE MY FAULT, I WILL GET IN TROUBLE. AND THAT'S A  
11 PERFECTLY LOGICAL CONCLUSION. IT'S AMAZING ANY KIDS EVER  
12 TELL. SOMETHING HAS TO INTERVENE TO GIVE THE CHILD  
13 PERMISSION TO TELL.

14 YOU KNOW WHAT ELSE IS HAPPENING HERE? THE MOLESTER  
15 AND THE MOLESTED KNOW SOMETHING VERY IMPORTANT. ADULTS  
16 BELIEVE OTHER ADULTS, THEY DON'T BELIEVE KIDS. IT IS SO  
17 UNNATURAL FOR A CHILD TO ACCUSE AN ADULT OF WRONGDOING, THAT  
18 ADULTS AUTOMATICALLY THINK, NO.

19 AND YOU CAN SEE THAT HAPPENING EVEN WITH PHYSICAL  
20 ABUSE. WHEN ANTHONY COMES HOME AND SAYS, ANGEL PUT CHILI IN  
21 MY EYES, AND RUBY QUICKLY SAYS, NO, ANGEL WOULD NOT DO THAT,  
22 SHE AUTOMATICALLY BELIEVES ANGEL. ANTHONY SAYS, WHAT, I AM  
23 THE ONE TELLING THE TRUTH, HE IS LYING. MOM DOES NOT  
24 BELIEVE ME AT FIRST, HE STILL RESENTS THAT, AND RIGHTFULLY  
25 SO.

26 THE BEST SPIN THAT RUBY CAN GIVE ON IT IS, WELL,  
27 STILL, YOU SHOULD WATCH THE KIDS BETTER. SHE BUYS ANGEL'S  
28 VERSION BECAUSE HE IS THE ADULT. ANTHONY IS JUST A CHILD.

1 KEEPS CREATING NEW CRIMES, BUT I WANT YOU TO START WITH THIS  
2 ONE, THIS IS YOUR BASIC INGREDIENT.

3 COUNT THREE, A TYPE OF CHILD MOLESTING. YOU WILL  
4 IMMEDIATELY NOTICE SOMETHING HAS BEEN EDITED. FORCE,  
5 VIOLENCE, DURESS, MENACE, OR FEAR OF BODILY INJURY TO THE  
6 CHILD OR TO ANOTHER PERSON. BASIC FELONY CHILD MOLESTING  
7 DOES NOT INVOLVE FORCE. THE CHILD COULD WANT THIS. CHILD  
8 COULD BE PLAYING A GAME, CHILD COULD NOT REALIZE WHAT WAS  
9 GOING ON. BUT, IF THE CHILD DOES REALIZE WHAT IS GOING ON,  
10 AND IT IS FORCIBLE, EITHER PHYSICAL FORCE OR INTIMIDATION,  
11 THAT'S WORSE, THAT'S A DIFFERENT CRIME.

12 WHAT YOU TAKE INTO ACCOUNT WHEN YOU LOOK AT FORCE IS  
13 THE VULNERABILITY OF THE CHILD, FOR EXAMPLE, THE AGE. ARE  
14 WE TALKING ABOUT A 13 YEAR-OLD VICTIM, A 19 YEAR-OLD  
15 DEFENDANT, OR A VERY YOUNG CHILD. AND THE SIZE OF THE  
16 VICTIM. IS THE VICTIM NEAR THE DEFENDANT'S SIZE OR  
17 ONE-FOURTH OF THE DEFENDANT'S SIZE? AND THE RELATIONSHIP  
18 BETWEEN THE VICTIM AND THE DEFENDANT. IS THIS A STRANGER,  
19 AND THE CHILD HAS THE OPTION OF SAYING NO, I AM GOING TO  
20 TELL MOM, OR IS IT A KNOWN, TRUSTED ADULT WHERE MOM SAID, GO  
21 WITH HIM, IT IS OKAY WITH ME, I TRUST HIM. YOU DO WHAT HE  
22 SAYS.

23 HOW MANY OPTIONS DOES THE CHILD HAVE IN AMANDA'S  
24 CASE? ABSOLUTELY NONE. MOM HANDED HER OVER TO THIS GUY.  
25 MOM KNOWS EVERYTHING. WHAT IS SHE SUPPOSED TO DO, HITCHHIKE  
26 HOME? SHE IS FAR FROM HOME. SHE IS WITH THIS GUY AND HER  
27 OPTIONS ARE NONE.

28 THIS IS A GOOD PLACE TO TALK ABOUT THE CONCEPT OF



1 YOU TALKING ABOUT, HONEY? NO, ACCORDING TO THE DEFENDANT,  
2 AMANDA SAYS THAT, AND MOTHER SAYS, OKAY. IT IS PART OF HIS  
3 EFFORT TO PUT RUBY ON TRIAL INSTEAD OF HIMSELF.

4 COMPARE THAT TO WHAT AMANDA SAYS AND WHAT RUBY SAYS  
5 AND WHAT ANTHONY SAYS. ANTHONY SAYS, I COME HOME UPSET AND  
6 SAY MOM, ANGEL PUT CHILE IN MY EYES. LOOK, ATTENTION, I AM  
7 HURTING, MOM, PAY ATTENTION. MOM SAYS YEAH, HONEY, WHAT  
8 HAPPENED? ANGEL PUT CHILE IN MY EYES. NO, ANGEL WOULD NOT  
9 DO THAT. ANGEL, HOW COULD YOU LET MY BOY DO THAT. DOES  
10 THAT MAKE SENSE?

11 AMANDA DOES NOT WANT TO GET INVOLVED, I DON'T KNOW  
12 HOW IT HAPPENED, MOM. IT IS ONLY AFTER THE POLICE, I DON'T  
13 KNOW WHAT HAPPENED, TO OAKLAND, OAKLAND COP GOES AWAY, AND  
14 CHILD, AMANDA, GETS PERMISSION TO TELL. ONLY WHEN YOU GET  
15 INTERVENTION FROM MOM SAYING, IT IS OKAY, YOU CAN TELL, ONLY  
16 THEN DOES AMANDA START TALKING ABOUT PEE-PEE MILK. IF SHE  
17 HAD SAID THAT WHEN SHE CAME IN, RUBY'S REACTION WOULD HAVE  
18 BEEN THE SAME AS IT WAS THEN, EARLIER.

19 WHEN AMANDA SAYS, AFTER THE BATH AND AFTER THE POLICE  
20 ARE GONE, I WANT TO TALK ABOUT THE PEE-PEE MILK, AND THEN  
21 RUBY BECOMES UPSET. IF THE DEFENDANT WERE RIGHT, RUBY WOULD  
22 HAVE BEEN UPSET WHEN AMANDA CAME HOME, AND SHE IS CLEARLY  
23 NOT. WHICH OF THOSE VERSIONS MAKES SENSE TO YOU? JUST, IS  
24 THIS A QUESTION OF FIGURING OUT WHAT FITS YOUR COMMON SENSE?

25 ONE OF THE OTHER THINGS THAT YOU CONSIDER IS BIAS,  
26 INTEREST, OR OTHER MOTIVE, AND I TELL YOU, I GIVE UP ON THIS  
27 ONE. ACCORDING TO THE DEFENDANT, HE HAD NOT MOLESTED  
28 AMANDA. HE HAD NOT PUT CHILE IN THE EYES OF ANTHONY. HE

1 DON'T KNOW. ONLY WAY TO FIND OUT, IS DO THAT. ONCE SHE IS  
2 OUT OF THERE AND THE EXAMINATION IS COMPLETED, THERE IS  
3 NEVER GOING TO BE ANOTHER WAY TO CHECK THAT OUT.

4 THEY CONTROL THE FLOW OF INFORMATION. IT WAS NOT  
5 SOME KIND OF CONSPIRACY WHERE IT WAS LIKE, WHAT CAN WE DO TO  
6 GET ANGEL ALVAREZ. IT WAS JUST, HEY, WE WON'T DO THIS, FOR  
7 WHATEVER REASON. I DID NOT FIND HER REASONS CONVINCING, BUT  
8 THEY MAY HAVE OVERLOOKED IT. BUT, BOTTOM LINE, IT DID NOT  
9 HAPPEN.

10 ONE OF THE THINGS THAT DOES HAPPEN IS THEY TAKE A  
11 CULTURE, COMES BACK POSITIVE, AFTER -- BY DECEMBER 5TH, WE  
12 HAVE THE RESULT, IT IS POSITIVE. NOW, BY CONTRAST, OFFICER  
13 ALVAREZ CAME IN AND TESTIFIED TODAY. HE CAME IN AND TOLD  
14 YOU HOW, YES, THEY DO A SEXUAL ASSAULT EXAM ON THE PERSON  
15 WHO IS BELIEVED TO BE THE PERPETRATOR. THEY DO THE EXAM.  
16 AND THEY COLLECT A VARIETY OF THINGS RELATED TO WHAT MIGHT  
17 BE POSSIBLE EVIDENCE IN A SEXUAL ASSAULT. THEY DO ALL OF  
18 THAT.

19 HE SAID THEY DID A PENILE SWAB, BUT IT IS JUST AROUND  
20 THE OUTSIDE OF THE PENIS, AND MAYBE JUST AROUND THE URETHRAL  
21 OPENING, BUT THERE IS NO INSERTION. THEY DO THAT ON THE  
22 CHILD TO SEE IF THEY CAN GET A CULTURE, WHICH THEY DID, BUT  
23 WHAT HAPPENS? DECEMBER 5, THEY FIND OUT THAT SHE, AMANDA,  
24 IS POSITIVE FOR CHLAMYDIA.

25 NOW, AS BEST WE CAN TELL, AND THERE WAS REFERENCE, I  
26 ASKED DETECTIVE ALVAREZ ABOUT THIS, APPARENTLY, WE KNOW THAT  
27 THERE WAS NO POLICE REPORT MADE ON THIS UNTIL APRIL 17TH,  
28 1997, SO WE ARE TALKING ABOUT FIVE MONTHS LATER. FIVE

1 MONTHS LATER THERE IS A POLICE REPORT DONE REFLECTING THE  
2 FACT THAT THIS TEST CAME BACK POSITIVE.

3 NOW, IF YOU ARE RUNNING THE WAR, DOING THE MISSION,  
4 AND YOU ARE TRYING TO GATHER ALL THE NECESSARY INTELLIGENCE,  
5 ISN'T IT IMPORTANT, WHEN YOU ARE GOING TO MAKE THIS KIND OF  
6 AN ACCUSATION, SOMETHING AS PROFOUND AS WE ARE TALKING ABOUT  
7 HERE, AS TO WHETHER OR NOT HE COMMITTED THESE EXTREMELY  
8 EGREGIOUS SEXUAL ACTS, DOESN'T IT MAKE SENSE, IF YOU REALLY  
9 CARE ABOUT BEING FAIR AND IMPARTIAL, AND GETTING ALL THE  
10 INFORMATION, DOESN'T IT MAKE SENSE THAT YOU WOULD SAY, NOW  
11 WHAT WE HAVE IS POSITIVE CHLAMYDIA.

12 MR. ALVAREZ IS STILL IN JAIL. WE HAVE A STIPULATION  
13 HE WAS IN JAIL DURING THIS PERIOD OF TIME UP UNTIL JANUARY  
14 27, 1997. LET'S GO DOWN -- WE WILL GET A COURT ORDER IF WE  
15 NEED TO, IF HE DOES NOT WANT TO COOPERATE. LET'S GO DOWN  
16 AND GET A SWAB FROM HIS URETHRA TO SEE WHETHER OR NOT HE  
17 SHOWS UP FOR POSITIVE CHLAMYDIA, BECAUSE WE THINK HE GAVE IT  
18 TO HER.

19 YOU ARE HERE TODAY HEARING THE PROSECUTOR ARGUE TO  
20 YOU HEY, HE GAVE IT TO HER, I REST MY CASE. SHE BASICALLY  
21 COULD HAVE STOOD UP AND SAID THAT TO YOU, SHE GOT CHLAMYDIA,  
22 WHO ELSE COULD SHE HAVE GOTTEN IT FROM? SHE HAD TO HAVE  
23 GOTTEN IT FROM HIM. BY THE WAY, YOU KNOW, WE JUST NEVER GOT  
24 AROUND TO CHECKING HIM OUT, BUT YOU NEED TO MAKE A DECISION  
25 BEYOND A REASONABLE DOUBT THAT THIS HAPPENED, BECAUSE WE ARE  
26 TELLING YOU THAT IT HAPPENED, AND BECAUSE HER MOTHER TOLD  
27 YOU IT HAPPENED A CERTAIN WAY.

28 AND THEN, AFTER SHE TALKED TO HER MOTHER, SHE CAME

1 AND TOLD THE POLICE THAT IT HAPPENED A CERTAIN WAY, SO,  
2 THEREFORE, THAT'S PROOF BEYOND A REASONABLE DOUBT.

3 TALK ABOUT THE PERFECT CRIME. THIS IS THE PERFECT  
4 ACCUSATION, BECAUSE WHAT DOES SHE DO, SHE STANDS UP IN A FEW  
5 MINUTES AND SAYS, HEY, IT IS A CHILD, YOU NEED TO PROTECT  
6 CHILDREN, WHICH YOU DO. HOW CAN YOU SAY I DON'T WANT TO  
7 PROTECT A CHILD. SO, YOU ARE PUT IN A VERY DIFFICULT  
8 POSTURE HERE, WHICH IS, KNOW WHAT, IF WE SAY THAT ANGEL  
9 ALVAREZ IS NOT GUILTY, WE ARE -- MAYBE WE ARE LETTING A  
10 CHILD MOLESTER OUT. HE COULD GO DO THIS AGAIN. IT IS A  
11 TERRIBLE THING, THAT'S THE EMOTIONAL POWER OF SOMETHING LIKE  
12 THIS. IT IS MORE POWERFUL THAN A BURGLARY AND PROPERTY  
13 CRIMES BECAUSE IT INVOLVES A CHILD.

14 SO, I MENTIONED THAT THE DEFENSE HAS AN OPPORTUNITY  
15 TO DO SOMETHING ABOUT THIS, BUT BECAUSE THE STATE CONTROLS  
16 THE FLOW OF INFORMATION, IT IS NOT UNTIL THE DEFENSE FINDS  
17 OUT THAT THERE IS A POSITIVE CHLAMYDIA RESULT ON THE CHILD,  
18 IT IS NOT UNTIL THEN THAT THE DEFENSE HAS ANY OPPORTUNITY TO  
19 TRY TO DO ANYTHING.

20 WHAT DID DR. PORTMORE TELL YOU? IF YOU HAVE HAD  
21 CHLAMYDIA, THERE IS A WAY TO TREAT IT. AND THE -- AND I  
22 THINK MISS RITTER SAID THAT THERE WAS A COURSE OF TREATMENT  
23 FOR THE CHILD TO GET RID OF IT, AND WHEN YOU GET RID OF IT,  
24 IT IS GONE. SO, IF ANGEL ALVAREZ FINDS OUT THAT THE CHILD  
25 HAS CHLAMYDIA, HE SHOULD SAY, I SHOULD GET MYSELF SOME  
26 PRESCRIPTION DRUG TO GET RID OF THIS STUFF SO I DON'T HAVE  
27 IT IF SOMEBODY WANTS TO GIVE ME A TEST.

28 THE PROSECUTOR HAS THAT ARGUMENT BECAUSE MR. ALVAREZ

1 NEVER EVER HAD AN OPPORTUNITY TO, BECAUSE HE DIDN'T KNOW  
2 ABOUT IT. WHEN HE WAS UNDER THEIR CONTROL, LOCKED UP IN  
3 JAIL, HE NEVER HAD AN OPPORTUNITY TO HAVE IT CHECKED. SO,  
4 THEREFORE, WHAT WE END UP HAVING IS A SITUATION WHERE YOU  
5 CAN'T PROVE A NEGATIVE. THERE IS NO WAY WE CAN COME IN HERE  
6 AND SAY TO YOU, WELL, HE NEVER HAD IT BECAUSE HOW CAN WE  
7 PROVE THAT?

8 SO, WE GO TO THE NEXT BEST POSSIBLE THING WE CAN DO,  
9 WHICH I WILL ADMIT TO YOU OFF THE TOP, I SAID THIS IN MY  
10 OPENING STATEMENTS TO YOU, IT IS NOT AS ADEQUATE AS I WOULD  
11 LIKE IT TO BE. IT IS THE BEST WE CAN DO UNDER THE  
12 CIRCUMSTANCES, BECAUSE THE STATE CHOSE NOT TO GIVE YOU ALL  
13 THE INFORMATION. I AM NOT SAYING IT WAS A CONSPIRACY. I AM  
14 JUST SAYING IT DID NOT HAPPEN. BY THE TIME THE DEFENSE  
15 COULD KNOW ABOUT IT, IT WAS TOO LATE TO DO ANYTHING ABOUT IT  
16 EXCEPT WHAT WE DID DO.

17 I BROUGHT DR. AMY PORTMORE IN HERE. SHE OBVIOUSLY IS  
18 WELL-QUALIFIED, THERE IS NO DISPUTE ABOUT THAT. SHE  
19 BASICALLY SAID, YOU KNOW, WE HAVE GOT THIS TEST, IT CAN BE  
20 GIVEN. AND I WON'T GO BACK OVER ALL THE DETAILS OF IT, YOU  
21 HEARD ABOUT IT. BUT SHE SAID, WE HAVE GOT THIS TEST AND IT  
22 IS NOT A PERFECT TEST, THE GOLD STANDARD BEST TEST IS TO  
23 TAKE A SWAB TO DO A CULTURE. BUT WE DID NOT HAVE THAT IN  
24 THIS CASE.

25 SO, WHAT DO WE DO? OKAY, WE TAKE A BLADDER TEST, AND  
26 BECAUSE THE BODY REACTS TO INFECTIONS, IT PRODUCES CERTAIN  
27 ANTI-BODIES. THOSE ANTI-BODIES WILL SHOW, IF YOU GIVE A  
28 CERTAIN KIND OF TEST, SHE DESCRIBED IT TO YOU, I G A, I G G,

1 I G M TESTS. THOSE TESTS WILL SHOW CERTAIN ANTI-BODIES IN  
2 YOUR SYSTEM, AND THEN THEY CAN LOOK AT THOSE AND SAY THIS  
3 REFLECTS WHETHER YOU HAD CHLAMYDIA, OR TRICHOMYCOSIS, OR  
4 CHLAMYDIA, PNEUMONIA.

5 UNFORTUNATELY, BELIEVE ME, THIS IS -- MAKES IT  
6 DIFFICULT. I AM WELL AWARE HOW DIFFICULT IT MAKES IT IN  
7 THIS CASE. WE ARE STUCK WITH THE FACT THAT DR. PORTMORE HAS  
8 TO GET UP THERE AND SAY TO YOU, YOU KNOW, WE CAN'T TELL.  
9 YOU HAVE GOT THESE MEASUREMENTS, 32 AND 64, SHE TALKED ABOUT  
10 THAT, AND I WILL GO BACK OVER THAT BECAUSE YOU HEARD IT  
11 ALREADY. SHE SAID YOU HAVE GOT THESE MEASUREMENTS, THEY ARE  
12 REAL CLOSE TOGETHER, AND THE DIFFERENCE BETWEEN THEM DOES  
13 NOT MEAN VERY MUCH.

14 BUT THE BOTTOM LINE IS THAT BECAUSE OF THE  
15 CROSS-REACTIVITY BETWEEN THE TWO DISEASES, BECAUSE THEY ARE  
16 SO SIMILAR TO EACH OTHER, BECAUSE OF THAT I CAN'T TELL YOU  
17 IF HE DID, IN FACT, HAVE CHLAMYDIA. BUT I ALSO CAN'T TELL  
18 YOU THAT HE DID NOT HAVE IT. IT IS UNCERTAIN. SHE DID SAY,  
19 IF YOU HAVE BRONCHIAL TYPE INFECTIONS, THE PNEUMONIA  
20 BACTERIA IS PRESENT IN THAT, AND THAT COULD CAUSE YOU TO  
21 SHOW THE RESULTS THAT WE SAW. BUT WE ARE NOT IN A POSITION  
22 TO BE ABLE TO SHOW YOU IN ANY SOLID, DEFINITIVE WAY WHAT  
23 THOSE TESTS MEAN.

24 I WISH WE WERE. BUT I WOULD ASK YOU TO LOOK AT IT  
25 THIS WAY. I TALKED ABOUT THE SCALES. THE ISSUE HERE IS FOR  
26 YOU TO LOOK AT AND SAY, YOU KNOW, HAVE THEY PROVEN BEYOND A  
27 REASONABLE DOUBT THAT HE GAVE HER CHLAMYDIA? BECAUSE I  
28 DON'T DISPUTE THAT GIVING A CHILD OR ANYBODY ELSE CHLAMYDIA,



1 THAT'S GREAT BODILY INJURY. I DON'T DISPUTE THAT. OF  
2 COURSE IT IS.

3 BUT THE ISSUE HERE IS NOT HOW HORRIBLE THAT IS,  
4 BECAUSE IT IS HORRIBLE, THE ISSUE IS WHETHER OR NOT HE  
5 INFLICTED THAT ON HER. I AM NOT GOING TO STAND HERE AND  
6 TELL YOU THERE ISN'T A BASIS FOR THE DISTRICT ATTORNEY TO  
7 GET UP HERE WHEN I AM DONE, AND SAY TO YOU, YOU KNOW, THIS  
8 IS ALL A BUNCH OF HOGWASH, SMOKE SCREEN, A RED HERRING,  
9 WHICH IT IS NOT, IT IS A LEGITIMATE ARGUMENT REGARDING  
10 REASONABLE DOUBT AND BALANCE. AND THIS IS WHERE THE GRAY  
11 AREA COMES INTO PLAY. SHE WILL TELL YOU IT IS ALL BOGUS  
12 BECAUSE IT SHOWED HE MAY HAVE HAD CHLAMYDIA. THAT'S GOOD  
13 ENOUGH GIVEN WHAT AMANDA SAID IN THIS CASE.

14 TALK ABOUT THE PERFECT ACCUSATION. BECAUSE YOU HAVE  
15 A LITTLE GIRL SAYING IT A CERTAIN WAY, THAT IT HAPPENED A  
16 CERTAIN WAY. AND THERE IS A STRONG, STRONG DESIRE TO  
17 BELIEVE WHAT SHE TELLS YOU BECAUSE IT IS A POWERFUL  
18 ACCUSATION.

19 NOW, WHAT I WOULD ASK YOU TO THINK ABOUT, THOUGH, IS  
20 ON THAT BALANCE, THAT WHEN YOU HAVE GOT A TEST THAT COMES  
21 BACK THE WAY OURS DID, WHERE YOU CAN'T SAY FOR SURE EITHER  
22 WAY THAT'S REASONABLE DOUBT, YOU HAVE TO DECIDE WHETHER YOU  
23 THINK THAT IT IS. I AM JUST ARGUING TO YOU, SAYING TO YOU  
24 THAT I THINK THAT IS REASONABLE DOUBT. THAT RAISES SERIOUS  
25 QUESTIONS ABOUT WHETHER OR NOT IT PROVES IT.

26 SECOND THING RELATED TO THIS TEST IS, MISS RITTER  
27 TESTIFIED, SHE IS NOT A DOCTOR, SHE TESTIFIED THAT SHE  
28 REMEMBERED SOME STUDIES, AND SHE DID NOT THINK THAT YOU



1 COULD PASS THIS DISEASE ANYWAY OTHER THAN GENITAL. IN OTHER  
2 WORDS, TOUCHING -- NORMALLY, IT WOULD BE THE MALE GENITALS  
3 AGAINST FEMALE GENITALS, THAT'S REALLY THE ONLY WAY SHE SAID  
4 YOU COULD PASS IT.

5 DR. PORTMORE, WHO ON THIS SUBJECT IS VASTLY MORE  
6 QUALIFIED THAN MISS RITTER, NOT SAYING. DR. PORTMORE IS AN  
7 EXPERT ON INFECTIOUS DISEASE. DR. PORTMORE SAID, IT COULD  
8 BE PASSED. IT WAS NOT LIKELY, BUT IT WAS MEDICALLY  
9 REASONABLY AND POSSIBLE THAT IT COULD BE PASSED IN A WAY  
10 OTHER THAN THROUGH CONTACT WITH THE PENIS ON THE VAGINA,  
11 WHICH IS WHAT IS CLAIMED HERE.

12 IT COULD HAVE BEEN PASSED THROUGH, FOR EXAMPLE,  
13 DIGITALLY, WITH A FINGER. AND WHO KNOWS WHAT WAYS THAT  
14 COULD HAVE HAPPENED. I GRANT YOU, WE DO NOT HAVE ANY  
15 SPECIFIC EVIDENCE SAYING TO YOU THAT JOE SMITH DID THIS, NOT  
16 ANGEL ALVAREZ. THAT'S TRUE.

17 I KNOW THAT THE DISTRICT ATTORNEY WILL ARGUE THAT TO  
18 YOU, THAT THE ONLY POSSIBLE PERSON THAT COULD HAVE DONE THIS  
19 IS ANGEL ALVAREZ BECAUSE THAT'S WHAT THE CHILD SAYS. THE  
20 CHILD SAID AFTER SHE HAD CONTACT WITH HER MOTHER, AND TALKED  
21 TO HER MOTHER ABOUT IT. BUT I WOULD SUBMIT TO YOU THAT IT  
22 IS NOT BEYOND REASON OR AN UNREASONABLE CONCLUSION TO  
23 BELIEVE THAT MAY HAVE HAPPENED FROM SOME OTHER SOURCE. AND  
24 THE ONLY WAY WE COULD HAVE FOUND OUT WHETHER OR NOT HE HAD  
25 CHLAMYDIA WAS COMPLETELY IGNORED. BECAUSE THE MISSION OF  
26 THAT MACHINE, I DON'T USE THAT IN A NEGATIVE SENSE, IT IS A  
27 MACHINE THAT HAS TO BE THERE AND DO ITS JOB, IT DID NOT DO  
28 ITS JOB RIGHT BECAUSE IT LEFT OUT ONE KEY PIECE OF

1 INFORMATION THAT YOU DON'T HAVE, THAT YOU ARE BEING ASKED TO  
2 JUMP TO THAT CONCLUSION. DON'T DO IT, IT IS NOT  
3 APPROPRIATE.

4 ONE LAST THING ALONG THOSE LINES. OTHER PEOPLE,  
5 OTHER THAN ANGEL ALVAREZ, HAD ACCESS TO AMANDA. IF YOU HAVE  
6 THAT DISEASE AND IT CAN BE PASSED DIGITALLY, YOU HAVE GOT TO  
7 CONSIDER, WHEN YOU ARE WEIGHING AND BALANCING REASONABLE  
8 DOUBT, YOU HAVE TO CONSIDER WHETHER THAT COULD HAVE BEEN  
9 DONE BY SOMEBODY ELSE. PERHAPS NOT EVEN WITH A SEXUAL  
10 INTENT, BATHING, PUTTING ON SOME TYPE OF MEDICATION, IT IS  
11 POSSIBLE IT COULD HAVE HAPPENED. IT IS NOT SO OUTLANDISH IT  
12 COULD NOT HAVE HAPPENED THAT WAY.

13 NOW, I AM NOT GOING TO STAND HERE AND TELL YOU IT  
14 COULD NOT HAVE HAPPENED ANOTHER WAY, BUT THAT'S WHERE THE  
15 GRAY AND THE BALANCE COMES INTO PLAY. NEXT PIECE OF  
16 PHYSICAL EVIDENCE THAT I WANT TO TALK TO YOU ABOUT IS THE  
17 SITUATION WITH ANTHONY.

18 WHAT I WOULD ASK YOU TO DO WITH HIM IS LISTEN TO HIS  
19 TAPE. AND I AM GOING TO CITE TO YOU A COUPLE SECTIONS ON  
20 HIS TAPE. I WILL GIVE YOU THE PAGE AND LINE NUMBER AND YOU  
21 CAN -- YOU WILL -- LISTENING TO IT, PROBABLY YOU NEED THE  
22 TRANSCRIPT BECAUSE IT IS HARD TO UNDERSTAND EVERYTHING. BUT  
23 I AM GOING TO ASK YOU TO LISTEN TO AND READ, START WITH PAGE  
24 17, LINE 21. I AM GOING TO READ A FEW SELECTED PIECES OF  
25 IT.

26 ANTHONY SAYS -- FIRST OF ALL, OFFICER ACOSTA SAYS  
27 OKAY, ANTHONY, HOW DID YOU GET THE CUT ON YOUR PEE-PEE?  
28 ANTHONY SAYS, I DON'T KNOW. ANGEL WAS PRETENDING HE WAS

1       CONTAINED A LIST OF PROPERTY THAT WAS TAKEN FROM  
2       MR. ALVAREZ'S VAN, AND INCLUDED IN THAT WERE SOME THINGS  
3       THAT THE POLICE, AGAIN, THE MACHINE IS WORKING ON THE  
4       INTELLIGENCE IT HAS GOT AND IT IS TRYING TO GO FORWARD AND  
5       ENGAGE IN THE COMBAT OF PROSECUTING THIS CASE.

6               SO, THERE ARE CERTAIN THINGS THAT THEY THINK OUGHT TO  
7       BE CHECKED OUT BASED UPON WHAT AMANDA TOLD THEM ABOUT WHAT  
8       HAPPENED. AND THOSE THINGS WERE CHECKED OUT. AND WE READ  
9       YOU A DESCRIPTION AND WE REFERRED TO THESE VARIOUS ITEMS OF  
10      EVIDENCE. ONE OF THEM, I WON'T TAKE IT OUT OF HERE, IS THE  
11      BAG, THE SLEEPING BAG WITH THE DINOSAURS ON IT. IT IS IN  
12      EVIDENCE AND YOU CAN LOOK AT IT, CAREFULLY EXAMINE IT.

13             THE SANTA CLARA COUNTY CRIME LAB IS A HIGHLY  
14      QUALIFIED ORGANIZATION. PEOPLE ARE THERE JUST TO EVALUATE  
15      THESE KINDS OF THINGS. WHAT WE HAVE, THEN, IS A RESULT  
16      WHICH SAYS, WE FOUND NO SEMEN ANYWHERE ON ANY OF THESE  
17      ARTICLES THAT YOU HAVE ASKED US TO EXAMINE. NONE.

18             NOW, THE CHILD HAS TOLD YOU SOMETHING REALLY  
19      DISGUSTING, AND THAT'S WHAT GOES BACK TO THIS PASSIONATE  
20      EMOTION THAT ARISES IN A CASE LIKE THIS. I RECOGNIZE A LOT  
21      OF PEOPLE DON'T THINK IT IS A GOOD IDEA FOR ADULTS TO DO  
22      THAT, AND I KNOW THAT 99.99 PERCENT OF THE POPULATION ARE  
23      GOING TO BE TOTALLY REVOLTED BY THE IDEA OF A MAN,  
24      SPECIFICALLY THIS ONE, TAKING HIS PENIS AND PUTTING IT  
25      INSIDE OF AMANDA, IN HER MOUTH, AND EJACULATING IN THERE.  
26      IT IS DISGUSTING.

27             AND I KNOW THAT THAT'S A POWERFUL ARGUMENT FOR THE  
28      D.A., HOW ELSE, WHAT ELSE COULD IT BE? BUT YOU HAVE TO LOOK

1 EXPLANATION FOR THAT. SO, WHAT I AM SAYING IS THAT THIS  
2 BLANKET, FOR WHATEVER REASON, THE POLICE DON'T EVEN CHECK IT  
3 OUT, AND THAT GOES TO THIS ISSUE OF THE MIND SET, YOU KNOW,  
4 WE WILL CHECK TO SEE IF THERE IS SEMEN. AND WHEN THEY --  
5 GIVEN WHAT SHE CLAIM HAPPENED HERE, YOU DON'T FIND ANY AT  
6 ALL. YOU DON'T GO, HEY, MAYBE, WE SHOULD CHECK MORE OF THE  
7 ITEMS, MAYBE WE MISSED SOMETHING. GO BACK AND TAKE A LOOK  
8 AT THE BLANKET. DON'T TELL ME YOU CAN'T OPEN UP THE BAG.  
9 OF COURSE YOU CAN OPEN THE BAGS, YOU JUST WRITE IT DOWN THAT  
10 YOU HAVE OPENED UP THE BAG. OR TAKE THEM ALL TO THE LAB,  
11 HAVE THEM LOOK, AND DECIDE WHAT OUGHT TO BE LOOKED AT. IT  
12 WAS NOT DONE.

13 BUT THEY WANT YOU TO BELIEVE THAT BEYOND A  
14 REASONABLE DOUBT, THAT MR. ALVAREZ DID WHAT HE IS ACCUSED  
15 OF. EVEN THOUGH THEY HAVE NOT TAKEN THE TIME TO GIVE YOU  
16 THAT INFORMATION, BUT THEY ARE SAYING HEY, FIND HIM GUILTY  
17 ANYWAY, BECAUSE WE HAVE PROVEN OUR CASE.

18 NOW, WITH RESPECT TO RUBY. WHEN I SAY, WHEN THE  
19 D.A. TELLS YOU WHAT A PERFECT CRIME THIS IS, I HAVE  
20 MENTIONED THIS SEVERAL TIMES BECAUSE I THINK IT IS REALLY  
21 INSTRUCTIVE, THE D.A. TELLS YOU THIS IS A PERFECT CRIME  
22 BECAUSE NOBODY IS THERE TO TELL. IT IS NOT REPORTED IN ANY  
23 WAY. YOU JUST HAVE TO RELY ON A CHILD TO GIVE YOU THE  
24 INFORMATION. THEN SHE CREATES THIS PICTURE, NOBODY WILL  
25 BELIEVE A CHILD. CHILDREN ARE JUST KIND OF THINKING THAT  
26 ALL ADULTS ARE GODZILLA. SHE MAKES THE ADULT WORLD SOUND  
27 MONSTROUS.

28 NOW, I AM NOT SAYING THAT THERE IS NOT A REASON

1 I PUT IT IN THERE ONLY BECAUSE I WANTED YOU TO BE AWARE HOW  
2 LESLIE HERNANDEZ WAS TELLING THE TRUTH ABOUT WHAT HAPPENED,  
3 THAT THE CHILD, AMANDA HAD DIARRHEA, AND THE PANTIES, I  
4 SUBMIT, LOOK LIKE THEY HAVE DIARRHEA. I HAVE THEM IN A  
5 SEALED BAG. THAT'S WHY I PUT THAT IN EVIDENCE, IT SUPPORTED  
6 WHAT LESLIE HERNANDEZ WAS TALKING ABOUT WHAT HAPPENED THAT  
7 DAY.

8 I THINK THERE IS ONE OTHER ARGUABLE USEFULNESS, WHICH  
9 IS THAT IT LOOKS LIKE AMANDA PROBABLY HAD SOMETHING IN THE  
10 WAY OF BEING A LITTLE BIT SICK, BECAUSE SHE HAD DIARRHEA,  
11 AND, OF COURSE, SHE THREW UP. AND THE D.A. HAS HER  
12 EXPLANATION OF IT, AND I WILL BE TALKING ABOUT WHAT WE SAY  
13 IS AN ALTERNATIVE REASONABLE EXPLANATION FOR WHAT MIGHT HAVE  
14 HAPPENED.

15 THE POINT THAT I AM MAKING IS THAT THE CHILD  
16 OBVIOUSLY HAD SOMETHING BOTHERING HER, OR SHE WOULDN'T HAVE  
17 HAD DIARRHEA. AND YOU CAN SEE IN THE PANTIES THAT SHE DID.

18 NOW, WHEN YOU GO TO THE SITUATION WITH RUBY, RUBY IS  
19 VERY IMPORTANT IN THIS CASE BECAUSE SHE IS THE CONDUIT BY  
20 WHICH THIS INFORMATION STARTS TO GET FED INTO THE SYSTEM I  
21 TALKED ABOUT. SO, SHE IS A SOURCE OF INTELLIGENCE FOR THE  
22 ARMY THAT GOES FORWARD WITH THESE KINDS OF CASES.

23 THE REASON I BROUGHT EJAZ ANAM IN HERE WAS BECAUSE I  
24 WANTED YOU TO BE AWARE THAT THERE HAD BEEN SOME INTERACTION  
25 REGARDING WHAT HAD HAPPENED THAT DAY. NOW, WE DON'T HAVE --  
26 IT WOULD BE GREAT, BUT WE DON'T HAVE A VIDEOTAPE OF WHAT  
27 HAPPENED, AND SO WE HAVE TO RELY ON WHAT PEOPLE SAW IN  
28 LITTLE BITS AND PIECES AS WE GO THROUGH THE CASE.

1 GREAT BODILY INJURY OR DEATH, VERSUS THE LESS SERIOUS TYPE,  
2 WHICH IS THE MISDEMEANOR TYPE. BUT RUBY GOT CAUGHT ON  
3 SOMETHING, I THINK, IN TERMS OF THE STORY SHE IS PUTTING  
4 OUT. I THINK THAT THE KIDS SAID SOMETHING TO HER THAT  
5 CAUSED HER TO START TO THINK THE WORST OF MR. ALVAREZ. I  
6 THINK THAT THERE WAS SOMETHING SAID.

7 FOR EXAMPLE, I THINK THAT AMANDA PROBABLY -- I DON'T  
8 HAVE ANY DOUBT THAT AMANDA SAID, I DRANK PEE-PEE MILK AND IT  
9 MADE ME THROW UP. I THINK SHE SAID SOMETHING LIKE THAT TO  
10 HER MOTHER. HER MOTHER UNDERSTANDABLY GOT REALLY ALARMED.  
11 SHE GOT ALARMED BY IT, AND SHE ASSUMED, UNDERSTANDABLY TO  
12 START OFF WITH, UNDERSTANDABLY SHE ASSUMED THE WORST, WHICH  
13 IS, OF COURSE, WHAT YOU ARE BEING ASKED TO BELIEVE HERE,  
14 THAT IT WAS ORAL COPULATION.

15 BECAUSE SHE ASSUMED THE WORST, IT GOES FROM THERE.  
16 SHE IS THE PERSON WHO SORT OF STARTS THIS THING MOVING.  
17 WHAT DOES SHE DO HERE? ANGEL ALVAREZ, WHO HAS KNOWN HER FOR  
18 SEVERAL YEARS, WHO HAS TAKEN CARE OF HER KIDS ON A VERY  
19 REGULAR BASIS, FOR QUITE A LONG PERIOD OF TIME, SHE CALLS  
20 HIM UP AND SAYS, ANGEL, I DON'T KNOW WHAT IS GOING ON HERE.  
21 ACCORDING TO THE D.A., SHE DID NOT REALLY EVEN BELIEVE  
22 ANTHONY IN THE BEGINNING ABOUT THE EYES.

23 WHAT DID SHE DO? SHE IMMEDIATELY CALLS OAKLAND  
24 POLICE DEPARTMENT ONCE SHE HEARS ABOUT THIS. WHY? SHE  
25 TESTIFIED TO US THAT SHE TOLD THE POLICE THAT HER DAUGHTER  
26 DESCRIBED FINGERS BEING STUCK INSIDE HER VAGINA, AND SHE IS  
27 SAYING, THE OAKLAND POLICE, AFTER I TOLD THEM THAT, I DON'T  
28 BELIEVE THAT. IF SHE TOLD THEM THAT FINGERS WERE INSIDE OF



1 INFORMATION, AND BECAUSE THEY HAVE BEEN FIGHTING, BECAUSE HE  
2 WAS TOLD HE WON'T DO IT ANYMORE, HE HAS HAD IT, HE FEELS HE  
3 IS BEING TAKEN ADVANTAGE OF, SHE IS NOT HAPPY WITH HIM. AND  
4 SHE MAKES THE ASSUMPTION THAT HE IS THE WORST KIND OF  
5 PERSON, THAT HE WOULD DO SOMETHING LIKE THIS TO HER, THAT'S  
6 WHAT I THINK HAPPENED.

7 I CAN'T PROVE IT, I RECOGNIZE THAT. D.A. CAN'T PROVE  
8 IT. SHE CAN -- SHE CAN ARGUE THIS HAPPENED. THAT'S WHERE  
9 YOU GOT INTO THE QUESTION OF REASONABLE DOUBT AND THE  
10 BALANCING PROCESS. SORRY THIS IS TAKING SO LONG. HE IS  
11 ACCUSED OF A FORCIBLE SEX ACT AGAINST A CHILD, AND ALSO LEWD  
12 CONDUCT WITH FORCE.

13 THERE IS LESSER INCLUDED OFFENSE, WHICH THE D.A.  
14 TALKED ABOUT. SHE GAVE YOU A GOOD DESCRIPTION OF THAT. YOU  
15 HAVE TO DECIDE, FOR EXAMPLE, IF YOU WERE TO DECIDE, WELL,  
16 MR. ALVAREZ DID COMMIT A SEX ACT WITH AMANDA, YOU HAVE TO  
17 DECIDE, OKAY, IF THAT HAPPENED, WAS IT DONE WITH FORCE, OR  
18 WAS IT JUST SOMETHING THAT HE DID, WHICH IS ILLEGAL, BUT IT  
19 WAS NOT DONE WITH FORCE. YOU HAVE TO MAKE THAT DECISION. I  
20 AM SAYING TO YOU, AS YOU HAVE HEARD, THAT HE DID NOT DO ANY  
21 OF THOSE THINGS. BUT, IF YOU THINK HE DID, YOU HAVE TO  
22 REACH A DECISION ON THAT PARTICULAR QUESTION.

23 NOW, ONE OF THE THINGS THAT YOU CAN HAVE, I SUSPECT  
24 THE DISTRICT ATTORNEY WILL ARGUE THIS WHEN SHE FINISHES.  
25 SHE WILL SAY THAT WE ARE NOT TALKING ABOUT PHYSICAL FORCE,  
26 WE ARE TALKING ABOUT DURESS, PUTTING A CHILD INTO FEAR.  
27 RUBY SAID, WHEN SHE WAS QUESTIONED ABOUT THIS, REGARDING  
28 AMANDA, SHE SAID -- ASKED HER WHY SHE DID NOT TELL. RUBY



SUPP. REPORTER'S TRANSCRIPT  
"Supp. RT"

1 because they're scared of the defendant. And they don't  
2 want to be in the same room because they don't know you from  
3 a bail of hay because it's been a long time. A fourth of  
4 their life times it has taken to get this case to trial.  
5 Because it was a terrifying, embarrassing, humiliating  
6 experience they don't want to talk about. And that is  
7 something you have to take into account when you see these  
8 children. Thank you.

9 THE COURT: Thank you, Ms. McKay-McCoy.

10 Mr. Schroeder, do you see wish to make an opening  
11 statement?

12 MR. SCHROEDER: I'll make it at this time.

13 THE COURT: All right. Very well.

14 MR. SCHROEDER: Ladies and gentlemen, as the judge  
15 said, this is an opening statement. It is not an argument  
16 to you. I'm just going to give you basically an overview  
17 from our perspective of what I expect the evidence to show  
18 in this case. You decide the case from what comes from the  
19 witness stand, so if I say something to you which turns out  
20 not to be exactly what's in the evidence, keep in mind I'm  
21 giving you more or less what I expect the evidence to show.

22 Mr. Alvarez had a relationship with Ruby, Ruby  
23 Rubio. They had known each other for some period of time.  
24 The District Attorney has told you that the reason,  
25 basically his interest was not in Ruby but in the children.  
26 I think the evidence will show contrary to that. He had a  
27 relationship, he was a good friend of Ruby. And, yes, he  
28 liked the children. And, yes, he helped out Ms. Rubio a lot

1 with caring for the children. She essentially was a single  
2 parent and needed assistance and he was willing to provide  
3 it much to his now great consternation given the  
4 circumstances he finds himself in.

5 But I think the evidence will show after you've  
6 heard all of it, it's not a situation where as the D.A. is  
7 trying to characterize it here this morning already as  
8 something where he's saying here's some little kids I can  
9 molest so therefore I want to become friends with them.

10 I don't think the evidence will show that. I  
11 think it will show he is a friend, somebody who helps her  
12 out which is very frequently.

13 I also think that this was a long term  
14 relationship. This had been going on for a long period of  
15 time. The evidence will show there was absolutely no  
16 indication of any kind of a problem in this relationship,  
17 nothing to indicate there was anything going on improper.  
18 The children were not being abused in any way until this  
19 fateful weekend of November of 1996, mid-November of 1996.  
20 That's when this issue came to the fore which brings us all  
21 here.

22 The situation came to light as Ms. McKay-McCoy has  
23 said to you after this weekend was over and the children  
24 were brought home. It's important to keep in mind when you  
25 listen to the evidence that something important happened  
26 when Mr. Alvarez brought those children home which was he  
27 told the mother: You know, look, I can't keep taking care  
28 of these kids for you for long periods of time. You've got

1 to take care of them. I'll help you out occasionally, but  
2 I've about had it with trying to take care of kids that are  
3 really a handful. And he felt he was being taken advantage  
4 of. Coupled with that and related to it was the fact that  
5 there had been plans and she had been talking to him, Ruby  
6 had been talking to Mr. Alvarez as if she wanted to have a  
7 relationship with him, they would be boyfriend and girl  
8 friend.

9 Now, I expect she will be denying that, but I  
10 think there will be evidence to indicate to the contrary,  
11 that there was this type of intent on both their parts.  
12 Mr. Alvarez basically said to her: I'm not going to do this  
13 anymore. And he told her that he was so fed up with the way  
14 he was being treated by her that he was going to perhaps  
15 even report her for certain things that she had done that he  
16 thought were illegal related to the father of these children  
17 who has been referred to by his nickname which is Nots.

18 And he made some threats to her regarding that  
19 because he was very upset with the fact that she was  
20 mistreating him. By that I mean she was using him  
21 essentially as a baby-sitter when she didn't want to take  
22 care of the kids and holding out on the description to him  
23 that they were going to have a relationship when in fact  
24 that wasn't her intent. And he felt he was being used, so  
25 he let her know that and there was an argument about it.

26 The evidence will also show that Ruby Rubio had  
27 told Mr. Alvarez: I spank my children and it's okay with me  
28 if you spank them in they misbehave.

## EXHIBIT C

CLERK'S TRANSCRIPT  
"CT"

1 YOU CAN TELL US A YEAR, TELL US A YEAR.

2 THE WITNESS: OKAY. WITHIN THE YEAR OF '96.

3 BY MS. MC KAY MC COY:

4 Q THANK YOU.

5 A '95.

6 THE COURT: WAS IT '95 INTO '96?

7 THE WITNESS: '95 INTO '96.

8 THE COURT: OKAY.

9 BY MS. MC KAY MC COY:

10 Q THANK YOU FOR MAKING IT CLEAR. AFTER FRIDAY, NOVEMBER  
11 15TH, 1996, WHEN DID YOU SEE YOUR CHILDREN AGAIN?

12 A NOVEMBER 19TH. I BELIEVE IT WAS A TUESDAY, BECAUSE THE  
13 MONDAY I HAD MY FOUR WISDOM TEETH PULLED OUT AND I NEEDED A  
14 BABYSITTER AND HE OFFERED TO TAKE THEM.

15 Q OFFERED TO TAKE THEM OR KEEP THEM?

16 A KEEP THEM.

17 Q DID YOU SEE THEM AGAIN THE FOLLOWING TUESDAY?

18 A HE BROUGHT THEM HOME THAT TUESDAY MORNING.

19 Q DID YOU NOTICE --

20 A I HAD SURGERY MONDAY.

21 Q THANK YOU. DID YOU NOTICE ANYTHING UNUSUAL WHEN HE  
22 BROUGHT THEM BACK TUESDAY MORNING?

23 A ANTHONY HAD RED MARKS AROUND HIS EYES. THEY LOOKED LIKE  
24 BURNS.

25 Q DID ANTHONY HAVE ANY OTHER INJURIES?

26 A NOT THAT I SAW.

27 Q I NEED TO MAKE MY QUESTION CLEAR. DID HE HAVE ANY OTHER  
28 INJURIES TO HIS FACE?



1 A NO, BUT HE HAD SOME TO HIS BODY, BUT I DIDN'T NOTICE  
2 THOSE UNTIL LATER THAT NIGHT WHEN I GAVE HIM A BATH.

3 Q WHEN DID YOU NOTICE LATER THAT NIGHT WHEN YOU GAVE HIM A  
4 BATH?

5 A HE HAD BRUISES ON HIS BACK, ON HIS BUTT.

6 Q ANYWHERE ELSE?

7 A I BELIEVE ON HIS LOWER THIGHS.

8 Q DID YOU OBSERVE ANY CUTS ANYWHERE ON HIS BODY?

9 A NO, NOT UNTIL THE POLICE WERE CALLED.

10 Q TELL ME ABOUT CALLING THE POLICE.

11 A I CALLED THE POLICE AFTER I GAVE THE KIDS A BATH, AND I  
12 ASKED THEM WHAT HAPPENED AND THEY TOLD ME. I CALLED THE  
13 POLICE, THEY CAME OUT THE FIRST TIME AND THEN I HAD TO CALL  
14 THEM BACK THE SECOND TIME THAT SAME NIGHT.

15 Q WHICH POLICE AGENCY DID YOU CALL?

16 A OAKLAND POLICE DEPARTMENT.

17 Q DID THEY COME OUT THE FIRST TIME YOU CALLED?

18 A YES, THEY DID.

19 Q HOW DID IT COME ABOUT THAT THEY CAME OUT AGAIN? TELL ME  
20 ABOUT THAT.

21 A BECAUSE I WAS PUTTING AMANDA AND THE KIDS TO BED AND I  
22 WAS TELLING THEM I WAS VERY PROUD OF THEM. THEY WERE TELLING  
23 THE OFFICERS THE TRUTH. I DIDN'T KNOW WHAT WAS GOING ON AND  
24 I WAS VERY PROUD OF THEM THAT THEY, YOU KNOW, HAD THE COURAGE  
25 TO TELL THEM.

26 Q DID YOU NOTICE ANOTHER UNUSUAL INJURY? YOU CAN TAKE  
27 YOUR TIME.

28 A THAT'S WHEN MY -- WHEN MY DAUGHTER AMANDA TOLD ME THAT SHE

1 DIDN'T TELL ME THE COMPLETE TRUTH, AND THAT HE HAD TOUCHED HER  
2 WHERE HE WASN'T SUPPOSED TO. AND THE REASON WHY SHE DIDN'T  
3 TELL THE OFFICER THE FIRST TIME IS BECAUSE HE WAS GOING TO HURT  
4 ME IF HE FOUND OUT THAT SHE HAD TOLD. AND SO I HAD TO CALL  
5 THEM AGAIN, AND THEY CAME OUT A SECOND TIME. AND THEN THEY DID  
6 -- THEY STARTED ASKING AMANDA AND ANTHONY QUESTIONS, AND THAT'S  
7 WHEN I HAD NOTICED THAT -- ANTHONY HAD TOLD ME HE HAD A CUT ON  
8 HIS PEE PEE, AND AMANDA HAD TOLD ME THAT HE HAD TOUCHED HER  
9 DOWN THERE. THAT'S WHEN EVERYTHING CAME OUT, THE SECOND TIME  
10 WHEN THE POLICE CAME.

11 Q LET ME BREAK THAT UP INTO TWO PARTS, ANTHONY AND  
12 AMANDA. DID YOU SEE A CUT ON ANTHONY'S PENIS?

13 A YES, WE DID, BECAUSE THE OFFICER TOLD HIM TO PULL --  
14 RETRACT HIS SKIN, AND THERE WAS A LITTLE RED MARK. IT LOOKED  
15 LIKE A LITTLE CUT. THEY TOOK PHOTOGRAPHS.

16 Q DID ANTHONY AT ANY TIME THIS DAY TO YOU OR TO THE POLICE  
17 OFFICERS APPEAR TO BE UPSET?

18 A VERY --

19 MR. SCHROEDER: OBJECTION TO THE POLICE OFFICERS,  
20 YOUR HONOR.

21 THE COURT: OVERRULED.

22 MR. SCHROEDER: SHE SAID, DID HE APPEAR TO BE UPSET  
23 TO THE POLICE OFFICERS, IF I UNDERSTOOD HER CORRECTLY.

24 THE COURT: TO HER OR TO THE POLICE OFFICERS.

25 MR. SCHROEDER: AND MY OBJECTION WOULD BE TO THE  
26 FORM OF THE QUESTION WITH RESPECT TO THE POLICE OFFICERS,  
27 SINCE I DON'T THINK SHE COULD TESTIFY AS TO WHAT THE POLICE  
28 OFFICERS' OBSERVATIONS WERE.

10

1 PUNISHMENT. HE ASKED HIM IF HE WANTED IT IN HIS MOUTH OR IN  
2 HIS EYES, AND ANTHONY SAID IN HIS MOUTH, AND ANGEL SAID NO,  
3 YOU'RE GOING TO GET IT IN YOUR MOUTH ANYWAY.

4 Q LET ME ASK YOU SOME QUESTIONS ABOUT AMANDA. IF I  
5 UNDERSTAND YOUR TESTIMONY, AS YOU WERE PUTTING THE KIDS TO  
6 BED AND PRAISING THEM FOR TALKING TO THE POLICE, AMANDA  
7 DISCLOSED ADDITIONAL INFORMATION; IS THAT CORRECT?

8 A UH-HUM; YES.

9 Q WAS SHE -- DID SHE APPEAR TO YOU TO BE UPSET OR  
10 DISTRESSED WHEN SHE TOLD YOU THIS?

11 A SHE LOOKED LIKE SHE REALLY DIDN'T WANT TO TALK ABOUT  
12 IT. SHE WAS, LIKE, ASHAMED. SHE DIDN'T WANT TO TELL ME.  
13 SHE WOULD JUST GIVE ME, LIKE, BITS AND PIECES OF WHAT HAD  
14 HAPPENED. AND THEN I TOLD HER IT'S OKAY. YOU CAN TELL ME.  
15 I'M NOT -- YOU KNOW, I'M NOT GOING TO BE MAD AT YOU. IT'S  
16 NOT YOUR FAULT. AND THAT'S WHEN SHE STARTED TELLING ME  
17 EVERYTHING, BECAUSE HE SAID THAT IT WAS GOING TO BE HER FAULT  
18 AND I WOULD BE MAD AT HER IF SHE TOLD ME.

19 Q TOLD YOU ABOUT WHAT?

20 A ABOUT WHAT HAD HAPPENED, ABOUT WHAT HE DID TO HER.

21 Q DID SHE TELL YOU WHAT HE HAD -- THE DEFENDANT HAD DONE  
22 TO HER?

23 A YES.

24 Q WHAT DID SHE TELL YOU?

25 A SHE SAID THAT HE HAD MADE HER DRINK HIS PEE PEE MILK,  
26 AND THAT HE HAD SPANKED HER. SHE HAD TOLD ME THAT HE HAD  
27 SPANKED HER BUT SHE DIDN'T TELL ME THE REASON WHY. AND SHE  
28 SAID THE REASON WHY HE SPANKED HER IS BECAUSE HE HAD JUST

1 THE COURT: LET HIM ASK THE QUESTION, YOU  
2 UNDERSTAND IT AND WAIT.

3 THE WITNESS: OKAY. I'M SORRY.

4 MR. SCHROEDER: EXCUSE ME JUST A MOMENT, YOUR  
5 HONOR.

6 THE COURT: SURE.

7 BY MR. SCHROEDER:

8 Q WITH RESPECT TO -- EXCUSE ME. WITH RESPECT TO AMANDA,  
9 WHEN THE KIDS WERE BROUGHT BACK TO YOU ON TUESDAY, ABOUT  
10 ROUGHLY WHAT TIME OF THE DAY WOULD YOU SAY THAT WAS?

11 A I BELIEVE IT WAS BETWEEN 9:00 AND 10:00 O'CLOCK. IT  
12 COULD HAVE BEEN 8:30. I DON'T REMEMBER. IT WAS PRETTY EARLY  
13 IN THE MORNING.

14 Q ALL RIGHT. AND THIS WAS ON A TUESDAY, YOU SAID?

15 A YES.

16 Q AND WHAT WAS IT THAT PROMPTED YOU OR CAUSED YOU TO THINK  
17 THERE MIGHT BE SOMETHING WRONG WITH AMANDA?

18 A I DIDN'T NOTICE ANYTHING UNTIL I GAVE HER A BATH. SHE  
19 HAD BRUISES ON HER THIGHS, HER BACK AND HER BUTT. AND I  
20 NOTICED A LITTLE BRUISE ON HER CHEEK.

21 Q DO YOU REMEMBER THAT YOU GOT A PHONE CALL FROM ANGEL ON  
22 SUNDAY THAT WOULD HAVE BEEN THE 17TH OF NOVEMBER TELLING YOU  
23 THAT AMANDA WAS SICK AND HAD BEEN THROWING UP AND HAD  
24 DIARRHEA?

25 A HE CALLED ME BUT HE DIDN'T TELL ME SHE WAS SICK.

26 Q HE DIDN'T SAY ANYTHING ABOUT THAT AT ALL?

27 A NO. HE JUST SAID THAT SHE'D ATE A LOT.

28 Q HE JUST CALLED YOU TO TELL YOU THAT SHE ATE A LOT?

1 SOMEONE TO WATCH THE KIDS FOR THE MORNING WHEN I HAD MY WISDOM  
2 TEETH PULLED OUT, AND HE SAID THAT IT WAS NO PROBLEM, THAT HE  
3 WOULD WATCH THE KIDS FOR ME BECAUSE I HAD TO GET THAT DONE.

4 Q OKAY.

5 A AND SINCE HE ALREADY HAD THEM, THAT HE MIGHT AS WELL  
6 JUST TAKE THEM TO, LIKE, GREAT AMERICA OR SOMETHING FOR ONE  
7 DAY.

8 Q OKAY. NOW, WHEN -- GETTING BACK TO TUESDAY THEN WHEN  
9 SHE CAME HOME, YOU'RE SAYING THAT YOU DIDN'T REALLY NOTICE  
10 ANYTHING WRONG WITH HER UNTIL YOU GAVE HER A BATH?

11 A SHE JUST HAD A BRUISE ON HER CHEEK. IT WAS JUST LIKE A  
12 LITTLE DOT, BUT I THOUGHT IT WAS JUST LIKE DIRT WHEN THEY  
13 WERE OUT, SO THAT'S WHY I GAVE THEM A BATH IN THE AFTERNOON.

14 Q DID SHE -- WHEN SHE GOT HOME, YOU SAID THAT WAS IN  
15 THE -- FAIRLY EARLY IN THE MORNING, WAS SHE ACTING AT ALL  
16 UNUSUAL AT THAT TIME?

17 A SHE WAS JUST REALLY QUIET.

18 Q WAS THAT UNUSUAL?

19 A NO. AMANDA'S A PRETTY QUIET CHILD.

20 Q OKAY. NOW, WHEN YOU SAW THE BRUISES, WHAT DID SHE --  
21 GIVE ME A SPECIFIC IDEA OF WHAT SHE SAID TO YOU -- OR STRIKE  
22 THAT -- WHAT YOU SAID TO HER WHEN YOU FIRST SAW IT.

23 A I WAS GIVING HER A BATH AND I TOLD HER TO WASH UP, BECAUSE  
24 I DON'T TOUCH THEM IN THEIR PRIVATE PART BECAUSE THAT'S THEIR  
25 OWN PRIVATE THINGS. I LET THEM WASH THEMSELVES. AND I ASKED  
26 HER WHAT HAPPENED. I NOTICED THAT WHEN SHE HAD TO REACH FOR  
27 HER SOAP SHE HAD, LIKE, A BRUISE ON HER THIGH, AND I TOLD HER,  
28 WHAT HAPPENED? AND SHE SAID, OH, ANGEL SPANKED ME. AND I

1 SAID, TURN AROUND, BECAUSE I WANTED TO LOOK AT HER BODY,  
2 BECAUSE I WANTED TO MAKE SURE SHE DIDN'T HAVE ANYTHING ELSE,  
3 LIKE ANY OTHER BRUISES, AND I NOTICED ON HER BACK, JUST A  
4 LITTLE BIT ON HER LOWER BACK, AND ON HER OTHER THIGH AND A  
5 COUPLE ON HER BUTT. AND I TOLD HER, WHAT HAPPENED? AND SHE  
6 SAID HE HAD SPANKED HER BECAUSE SHE HAD THREW UP ON HIS COVER.

7 Q OKAY. NOW, WITH RESPECT TO THE SPANKING, DO YOU SPANK  
8 YOUR CHILDREN SOMETIMES?

9 A YES, I DO SOMETIMES.

10 Q WHEN YOU SPANK THEM DO YOU EVER USE A BELT?

11 A SOMETIMES I DO. I USED TO.

12 Q OKAY. NOW, HAD -- YOU HAD TOLD ANGEL THAT IF NECESSARY  
13 HE COULD SPANK THE CHILDREN; ISN'T THAT RIGHT?

14 A YES, WITH HIS HAND.

15 Q DID YOU SPECIFICALLY SAY WITH THE HAND?

16 A YES, I DID.

17 Q YOU SURE ABOUT THAT?

18 A YES, I DID. AND HE SAID THAT IT PROBABLY WOULDN'T BE  
19 NECESSARY BECAUSE THEY LISTEN TO HIM, AND THAT HE USUALLY  
20 JUST PUTS THEM ON PUNISHMENT. HE SITS THEM IN THE CORNER.

21 Q NOW, WHEN SHE WAS DESCRIBING THIS TO YOU, SHE SAID THAT  
22 A BELT HAD BEEN USED?

23 A SHE DIDN'T SAY WHAT HAD BEEN USED. SHE JUST SAID SHE  
24 WAS SPANKED.

25 Q DID YOU ASK HER, GIVEN THE FACT THAT YOU SAW THESE  
26 PARTICULAR INJURIES, DID YOU SAY TO HER, YOU KNOW, HOW DID IT  
27 HAPPEN OR TRY TO GET SOME DETAILS FROM HER?

28 A YES. I ASKED HER LATER AND SHE SAID IT WAS WITH HIS

1 SHOE.

2 Q SAID IT WAS WITH A SHOE?

3 A YES.

4 Q DID YOU ASK HER WHAT -- WHAT KIND OF SHOE IT WAS?

5 A SHE SAID IT WAS HIS SANDAL.

6 Q OKAY. YOU SAID THAT YOU ASKED HER THAT LATER. WAS THAT

7 AFTER THE OAKLAND POLICE HAD BEEN THERE OR BEFORE?

8 A THAT WAS WHILE THE OAKLAND POLICE WERE THERE.

9 Q SO WHEN THE OAKLAND POLICE WERE THERE YOU WERE THERE

10 DURING THE WHOLE TIME THEY WERE TALKING TO HER?

11 A YES, I WAS.

12 Q DID YOU NOTICE WHETHER THE OFFICER WAS WRITING DOWN

13 ANYTHING, LIKE TAKING NOTES?

14 A HE WAS MAKING A REPORT.

15 Q HE WAS YOU SAY?

16 A UH-HUM; YES.

17 Q OKAY. SO WHEN SHE TOLD YOU THAT SHE HAD BEEN SPANKED BY

18 HIM, WAS THERE SOMETHING IN PARTICULAR THAT CAUSED YOU AT

19 THAT POINT TO CALL -- STRIKE THAT. WAS THERE SOMETHING IN

20 PARTICULAR THAT CAUSED YOU TO CALL THE POLICE AFTER SHE TOLD

21 YOU SHE HAD BEEN SPANKED BY HIM?

22 A NO.

23 Q SO THE FACT THAT SHE TOLD YOU THAT SHE HAD BEEN SPANKED

24 BY HIM CAUSED YOU TO CALL THE OAKLAND POLICE DEPARTMENT?

25 A NO, NOT UNTIL I GAVE ANTHONY A BATH. THEN I CALLED THE

26 OAKLAND POLICE DEPARTMENT.

27 Q OKAY. NOW, WHEN YOU GAVE ANTHONY A BATH, WHAT WAS IT

28 THAT YOU SAW?



1 A HE HAD BRUISES ON HIS BUTT AND ON HIS THIGHS.

2 Q AND DID YOU ASK HIM HOW HE GOT THOSE?

3 A YES, I DID.

4 Q AND WHAT DID HE SAY?

5 A HE SAID HE SPANKED HIM WITH HIS SHOE AND HIS HAND.

6 Q NOW, YOU WERE AWARE THAT -- STRIKE THAT. WERE YOU AWARE  
7 THAT THE CHILDREN HAD BEEN, AT LEAST ON PREVIOUS OCCASIONS,  
8 AT LEAST ONE PREVIOUS OCCASION, THAT THEY HAD BEEN SPANKED BY  
9 ANGEL?

10 A YES, THEY HAVE -- THEY HAVE BEEN SPANKED BEFORE BY  
11 ANGEL, BUT THERE WERE NEVER ANY BRUISES.

12 Q SO AS A RESULT OF SEEING THE BRUISES ON ANTHONY YOU  
13 DECIDED TO CALL THE OAKLAND POLICE DEPARTMENT?

14 A YES, I DID, 'CAUSE THEY BOTH HAD BRUISES, AND THEN I  
15 JUST KNEW SOMETHING WAS WRONG.

16 Q WELL, WHEN YOU SAW THEM ON AMANDA, AS I UNDERSTAND IT,  
17 YOU DIDN'T CALL THE OAKLAND POLICE?

18 A NO, I DIDN'T, BECAUSE I WAS GIVING THEM BOTH A BATH. I  
19 WAS GIVING MY DAUGHTER A BATH FIRST, THEN I TOLD HER JUST  
20 WRAP YOURSELF UP IN A TOWEL AND THEN CALL ANTHONY SO I CAN  
21 GIVE HIM A BATH. AND THEN I NOTICED THE BRUISES ON HIM AND I  
22 SAID THERE'S SOMETHING WRONG, BECAUSE YOU BOTH HAVE BRUISES.  
23 AND I THOUGHT -- YOU KNOW, SOMETIMES ANTHONY, HE'S -- HE'S  
24 NOT A PROBLEM CHILD BUT HE'S VERY DIFFICULT SOMETIMES, AND SO  
25 I WAS JUST, LIKE -- I DIDN'T, YOU KNOW, AMANDA SHOULD HAVE  
26 BEEN -- I FIGURED AMANDA IS A REALLY QUIET CHILD. I WAS,  
27 LIKE, WHY WOULD SHE BE SPANKED LIKE THAT? AND I NOTICED ON  
28 ANTHONY, AND I SAID SOMETHING IS WRONG, AND THEN HE STARTED

1 WESLEY J. SCHROEDER  
2 Attorney at Law  
3 181 Devine Street  
4 San Jose, CA 95110  
5 (408) 277-0377  
6 State Bar #59977

7 Attorney for Defendant,  
8 ANGEL ALVAREZ

**FILED**

JUN 11 1999

STEPHEN V. LOVE

County Clerk  
Santa Clara County  
DEPUTY

9  
10  
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12  
13 IN AND FOR THE COUNTY OF SANTA CLARA  
14

15 PEOPLE OF THE STATE )  
16 OF CALIFORNIA, )  
17 )  
18 Plaintiff, )  
19 vs. )  
20 )  
21 ANGEL ALVAREZ, )  
22 )  
23 Defendant, )  
24 )

Case No. 198084

NOTICE OF MOTION FOR  
ORDER PERMITTING CROSS-  
EXAMINATION OF PRIOR  
SEXUAL CONTACT OF  
COMPLAINING WITNESS

Date: June 14, 1999  
Time: 9:00 a.m.  
Place: Judge Emerson  
Department 33

25 TO THE DISTRICT ATTORNEY OF SANTA CLARA COUNTY AND HER  
26 REPRESENTATIVE:

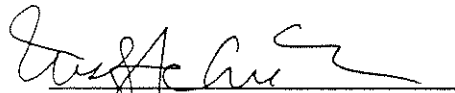
27 PLEASE TAKE NOTICE that on June 14, 1999, at 9:00 a.m.,  
28 or as soon thereafter as the matter may be heard in the  
courtroom of Department 33 of the above-entitled court, the  
defendant will move for an order allowing cross-examination of  
the complaining witness in this case regarding the prior  
sexual contact of the witness.

This motion will be made on the grounds that prior sexual  
contact is relevant and material to the determination of the  
credibility of the complaining witness.

206

1 The motion will be based on this notice of motion, the  
2 attached offer of proof, the memorandum of points and  
3 authorities served and filed herewith, on the records on file  
4 in this action, and on such oral and documentary evidence as  
5 may be presented at the hearing on the motion.

6  
7 Dated: 6-11-99

  
WESLEY J. SCHROEDER  
Attorney for Defendant

1 WESLEY J. SCHROEDER  
Attorney at Law  
2 181 Devine Street  
San Jose, CA 95110  
3 (408) 277-0377  
State Bar #59977  
4  
5 Attorney for Defendant,  
ANGEL ALVAREZ

6  
7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SANTA CLARA  
10

11	PEOPLE OF THE STATE )	Case No. 198084
	OF CALIFORNIA, )	
12	Plaintiff, )	POINTS AND AUTHORITIES
	vs. )	IN SUPPORT OF MOTION
13	ANGEL ALVAREZ, )	FOR ORDER REGARDING
	Defendant, )	PRIOR SEXUAL CONTACT
14		OF COMPLAINING WITNESS
15		
16		

17 Defendant submits the following points and authorities in  
18 support of the motion for an order regarding prior sexual  
19 contact of the complaining witness.

20 I

21 THE TRIAL COURT HAS DISCRETION TO  
22 ADMIT EVIDENCE OF THE PRIOR SEXUAL  
23 CONTACT OF THE COMPLAINING WITNESS  
24 IN ORDER TO IMPEACH THE CREDIBILITY  
25 OF THE WITNESS  
26

27 Evidence Code § 782 provides a procedure by which the  
28 trial court is given discretion to admit evidence of the prior

1 sexual contact of the complaining witness to attack the  
2 credibility of that witness, even though the offer concerns an  
3 underlying issue, such as consent, the prior relevant sexual  
4 contact may be admissible. (People v Daggett (1990, 2nd Dist)  
5 225 Cal App 3d 751, 275 Cal Rptr 287; People v Rioz (1984, 5th  
6 Dist) 161 Cal App 3d 905, 207 Cal Rptr 903.)

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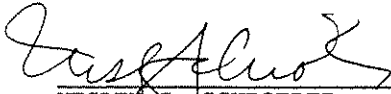
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27

28

6-11-99

  
WESLEY J. SCHROEDER  
ATTORNEY AT LAW

1 WESLEY J. SCHROEDER  
Attorney at Law  
2 181 Devine Street  
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Attorney for Defendant,  
5 ANGEL ALVAREZ

6  
7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SANTA CLARA  
10

11 PEOPLE OF THE STATE ) Case No. 198084  
12 OF CALIFORNIA, )  
13 Plaintiff, ) OFFER OF PROOF REGARDING  
14 vs. ) PRIOR SEXUAL CONTACT OF  
15 ANGEL ALVAREZ, ) THE COMPLAINING WITNESS  
16 Defendant, )  
17

18 Defendant ANGEL ALVAREZ, through counsel, hereby submits  
19 the following offer of proof regarding prior sexual contact of  
20 the complaining witness:

21 If called to testify, the following witnesses would state  
22 the following:

23 The complaining witness in this case, Amanda Acosta, was  
24 regularly babysat by defendant, Angel Alvarez. In the course  
25 of his babysitting duties with Amanda she confided in him that  
26 her biological father, Ivan Acosta, had molested her.

27 This was stated to defendant sometime in October, 1996.  
28 At that time she told defendant Ivan had taken her to  
McDonald's and then to her grandmother's house. She stated

1 that at her grandmother's she and her father had their clothes  
2 off, and he touched her "down there."

3 After being told of this by Amanda, defendant spoke with  
4 Amanda's mother, Ruby Rubio. He inquired as to whether Ivan  
5 had molested Amanda. When he asked this question, Ms. Rubio  
6 responded by glaring angrily at Amanda and scolding her by  
7 saying, "Why are you opening your mouth, you little bitch?  
8 Don't be talking shit." Ms. Rubio then advised defendant this  
9 matter was none of his business.

10 The complaining witness did contract chlamydia in this  
11 case. There will be medical testimony that it is possible  
12 sexual contact resulting in a chlamydia infection can remain  
13 dormant for some period of time before it shows symptoms.  
14 Since the prosecution is alleging defendant infected  
15 complaining witness with chlamydia, it is important to the  
16 defense to present an alternative explanation as to how this  
17 infection could have been contracted.

18 For this reason, while this does not really involve  
19 sexual conduct by the complaining witness, it does involve  
20 sexual contact imposed upon her by her father. Therefore,  
21 questions of her and her mother, Ms. Rubio, are relevant and  
22 material to the defense in order to establish an alternative  
23 explanation as to how this infection may have occurred.

24 In addition, sometime in late-summer of 1996, Amanda  
25 confided in defendant she had seen her mother and father  
26 kissing each other and "doing nasty things." From the  
27 description given, it appeared that such activity took place  
28 when Amanda slept in the same bedroom with her parents in



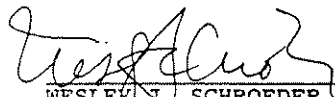
1 Hayward.

2 Because of this statement, which does not involve sexual  
3 activity on the part of complaining witness but does involve  
4 observations of sexual activity by her, it is a material and  
5 relevant inquiry necessary to establish the complaining  
6 witness has observed sex acts in the past which could explain  
7 her ability to describe sexual actions.

8 I declare under penalty of perjury that the foregoing is  
9 true and correct.

10 Executed on 6-11-99, at San  
11 Jose, California.

12  
13 Respectfully submitted,

14   
15 \_\_\_\_\_  
16 WESLEY J. SCHROEDER  
17 Attorney for Defendant  
18  
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20  
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23  
24  
25  
26  
27  
28

CALJIC 10.42

LEWD ACT WITH A CHILD UNDER  
FOURTEEN YEARS—FORCE OR FEAR  
(Pen. Code, § 288, subd. (b)(1))

JAMES C. EMERSON

Judge

[Defendant is accused [in Count ~~1~~ 3] of having  
committed the crime of lewd act with a child by force or fear in  
violation of section 288, subdivision (b)(1) of the Penal Code.]

Every person who willfully commits any lewd or lascivious  
act upon or with the body, or any part or member thereof, of a  
child under the age of 14 years, by the use of force, violence,  
duress, menace, or fear of immediate and unlawful bodily injury  
on the child or another person, and with the specific intent of  
arousing, appealing to, or gratifying the lust or passions or  
sexual desires of that person or the child, is guilty of the  
crime of a lewd act with a child by force or fear in violation of  
Penal Code section 288, subdivision (b)(1).

A "lewd or lascivious act" is defined as any touching of the  
body of a child under the age of 14 years with the specific  
intent to arouse, appeal to, or gratify the sexual desires of  
either party. To constitute a lewd or lascivious act, it is not  
necessary that the bare skin be touched. The touching may be  
through the clothing of the child.

[The law does not require that the lust, passions, or sexual  
desires of either persons be actually aroused, appealed to, or  
gratified.]

The term "force" means physical force that is substantially  
different from or substantially greater than that necessary to  
accomplish the lewd act itself.

[The term "duress" means a direct or implied threat of  
force, violence, danger, hardship or retribution sufficient to  
coerce a reasonable person of ordinary susceptibilities to (1)  
perform an act which otherwise would not have been performed, or  
(2) acquiesce in an act to which one otherwise would not have

submitted. The total circumstances, including the age of the victim, and [REDACTED] [her] relationship to defendant, are factors to consider in appraising the existence of duress.]

In order to prove this crime, each of the following elements must be proved:

1. A person touched the body of a child;
2. The child was under 14 years of age;
3. The touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child; and
4. The touching was done by the use of force, violence, duress, menace, or fear of immediate and unlawful injury on the child or another person.

SUPP. CLERK'S TRANSCRIPT 1  
"Supp. CT 1"

PEOPLE VS. ANGEL ALVAREZ  
DOCKET NO. C9615417  
SAN JOSE POLICE DEPARTMENT  
INTERVIEW OF AMANDA ACOSTA 11-20-96

1 ALVAREZ When, when he touched, you said, okay, first you  
2 said, which, which...  
3 ACOSTA Achoo.  
4 ALVAREZ Ooh! Bless you. Which did he do first? Did he  
5 uh, touch you with his uh, with his pee pee first?  
6 ACOSTA Yeah.  
7 ALVAREZ Where did he touch you?  
8 ACOSTA Um, down there.  
9 ALVAREZ Huh?  
10 ACOSTA Down there.  
11 ALVAREZ What, what is down there?  
12 ACOSTA Pee.  
13 ALVAREZ Oh, your pee. Let me ask you. Okay, I forgot to  
14 ask you that. You know what?  
15 ACOSTA No.  
16 ALVAREZ Let me ask you, okay? What do you use your pee  
17 for?  
18 ACOSTA To go pee.  
19 ALVAREZ That's what it's for, huh? The pee...  
20 ACOSTA This is to go caca.  
21 ALVAREZ Oh, the, the butt is to go caca and the pee, and  
22 the pee is to go...  
23 ACOSTA Pee pee.  
24 ALVAREZ To go pee pee. Okay. You know what? I've got,  
25 I've got another picture here, okay? Um, what,  
26 what, what do you call this, what do you call this

PEOPLE VS. ANGEL ALVAREZ  
DOCKET NO. C9615417  
SAN JOSE POLICE DEPARTMENT  
INTERVIEW OF AMANDA ACOSTA 11-20-96

1 ACOSTA Um huh.  
2 ALVAREZ Where did he put the milk from his pee pee?  
3 ACOSTA (inaudible) in the little hole.  
4 ALVAREZ Huh?  
5 ACOSTA In the little hole.  
6 ALVAREZ Yeah, but I mean, it came out of the little hole,  
7 right? It didn't go into the little hole.  
8 ACOSTA It came out of the little hole.  
9 ALVAREZ And then when it came out of the little hole, where  
10 did it uh...  
11 ACOSTA In my mouth.  
12 ALVAREZ It came out in, in your mouth?  
13 ACOSTA Um huh.  
14 ALVAREZ Did uh, I forgot, I don't know if I asked you. Did  
15 he touch you, look. Amanda.  
16 ACOSTA Um huh.  
17 ALVAREZ Did he touch you with his pee pee, show me where he  
18 touched you with his pee pee on, on your body?  
19 Mark it, mark it with this.  
20 ACOSTA Okay.  
21 ALVAREZ Go ahead. Show, show...  
22 ACOSTA Um...  
23 ALVAREZ Where did he touch you?  
24 ACOSTA Where's the pee?  
25 ALVAREZ Your pee is right there.  
26 ACOSTA Um.

20

PEOPLE VS. ANGEL ALVAREZ  
DOCKET NO. C9615417  
SAN JOSE POLICE DEPARTMENT  
INTERVIEW OF AMANDA ACOSTA 11-20-96

1 ALVAREZ Oh, you're talking about his pee pee or your pee  
2 pee?  
3 ACOSTA Mine.  
4 ALVAREZ Yours? Um. Where, where is your pee pee? Where,  
5 where, okay. Did, did he touch you there with,  
6 with his, right there? Is that where he touched  
7 you with uh, with his pee pee?  
8 ACOSTA Um huh.  
9 ALVAREZ Are you sure?  
10 ACOSTA Um huh. No.  
11 ALVAREZ You're not sure? Oh, okay. Let me ask you. Did  
12 he touch you here?  
13 ACOSTA No. Yeah.  
14 ALVAREZ Yes or no?  
15 ACOSTA Yes.  
16 ALVAREZ Remember we were talking about telling the truth?  
17 ACOSTA Um huh.  
18 ALVAREZ Okay. So did he touch you there with his pee pee?  
19 ACOSTA No.  
20 ALVAREZ He didn't touch you there with his pee pee?  
21 ACOSTA No.  
22 ALVAREZ Where did he touch you with his pee pee?  
23 ACOSTA Nowhere.  
24 ALVAREZ Nowhere?  
25 ACOSTA Uh uh.  
26 ALVAREZ Now, okay, now remember. You just told me a little

PEOPLE VS. ANGEL ALVAREZ  
DOCKET NO. C9615417  
SAN JOSE POLICE DEPARTMENT  
INTERVIEW OF AMANDA ACOSTA 11-20-96

1 while ago that he put his pee pee in your mouth.  
2 Is that true or is that not true?  
3 ACOSTA True.  
4 ALVAREZ Huh?  
5 ACOSTA True.  
6 ALVAREZ It's true? Okay. And did he, did he touch you...  
7 Let me ask you. Did he touch you here? What did  
8 he touch you here with?  
9 ACOSTA His finger.  
10 ALVAREZ His finger?  
11 ACOSTA Only.  
12 ALVAREZ Uh?  
13 ACOSTA His finger only.  
14 ALVAREZ His finger only?  
15 ACOSTA Um huh.  
16 ALVAREZ How many times did he um, did he touch you with his  
17 finger here?  
18 ACOSTA A lot of times.  
19 ALVAREZ A lot of times? Remember the, this last time when  
20 you threw up, did he, did he touch you that day  
21 with uh, with his finger there? He did?  
22 ACOSTA Um huh.  
23 ALVAREZ Did, did you ever, did you ever uh, did he ever  
24 kiss you here on your pee?  
25 ACOSTA Um huh.  
26 ALVAREZ Is that a yes or a no?



PEOPLE VS. ANGEL ALVAREZ  
DOCKET NO. C9615417  
SAN JOSE POLICE DEPARTMENT  
INTERVIEW OF AMANDA ACOSTA 11-20-96

1 ACOSTA Yes.  
2 ALVAREZ He did?  
3 ACOSTA Yeah.  
4 ALVAREZ How many times did he kiss you there with his pee?  
5 ACOSTA A lot.  
6 ALVAREZ A lot of times?  
7 ACOSTA Um huh.  
8 ALVAREZ This, this last time when you threw up, did um, did  
9 he kiss you there?  
10 ACOSTA Yeah.  
11 ALVAREZ Huh?  
12 ACOSTA Yeah.  
13 ALVAREZ Do you remember when we were talking about telling  
14 the truth?  
15 ACOSTA Yes.  
16 ALVAREZ Are you telling me the truth now?  
17 ACOSTA Yeah. (inaudible).  
18 ALVAREZ Huh?  
19 ACOSTA Yeah.  
20 ALVAREZ You are telling me the truth?  
21 ACOSTA Um huh.  
22 ALVAREZ Okay. I'll tell you what. Let me ask you.  
23 ACOSTA Um huh.  
24 ALVAREZ Okay? Did, uh, just one, one last time.  
25 ACOSTA Huh.  
26 ALVAREZ He touched you here on your pee.

PEOPLE VS. ANGEL ALVAREZ  
SJPD #96-324-1241  
SAN JOSE POLICE DEPARTMENT

INTERVIEW OF DEFENDANT BY OFFICER ERIC ROSENGREN ON 11-20-96

1 ROSENGREN Have you hit the little girl before, I mean this weekend?

2 ALVAREZ Hum um. No.

3 ROSENGREN What happened this weekend?

4 ALVAREZ I never hit them-but I always hit them with my hand, on  
5 their butts.

6 ROSENGREN Did you use your belt that we have here, or...

7 ALVAREZ That belt.

8 ROSENGREN What happened this weekend that made you use the belt as  
9 opposed to other weekends?

10 ALVAREZ Well, Amanda is a really smart girl. Because she knows  
11 how to bribe you, you know. "If you buy me this, I'll be  
12 nice," or even, you know what I mean? Um, basically, her  
13 mother taught her that. Her mother tells her um, to tell  
14 me, "Buy me this, buy me that." So...but Amanda wanted to  
15 go to McDonald's, and I said, "No." 'Cause you know like  
16 when we go to dinner, we go to a restaurant. And I took  
17 them to the restaurant, and the chicken soup, and she went  
18 (inaudible) the chicken soup. And I said, "Okay, Amanda,  
19 don't be acting like that right now." That's when she  
20 goes, "I want McDonald's. I want a Happy Meal." I said,  
21 "You're gonna eat that soup, because that's all I'm buying  
22 for you." And she wouldn't eat it.

23 ROSENGREN Hm.

24 ALVAREZ And she, you know, like spit in it. And so when I took  
25 her to the flower shop, I have a flower shop that my  
26 sister and I own. I spanked her there. Um, she said she

SUPP. CLERK'S TRANSCRIPT 2  
"Supp. CT 2"

PEOPLE VS. ANGEL ALVAREZ  
SJPD #96-324-1241  
SAN JOSE POLICE DEPARTMENT

INTERVIEW OF DEFENDANT BY OFFICER ERIC ROSENGREN ON 11-20-96

1 ALVAREZ Yeah.

2 ROSENGREN Doesn't make sense my friend. She's angry at you every  
3 weekend, and this weekend all of a sudden she's gonna make  
4 up all these allegations?

5 ALVAREZ She's angry.

6 ROSENGREN Or have the children making these extraordinary  
7 allegations?

8 ALVAREZ Because I threatened that I would tell that she harbored  
9 him, unless she stopped seeing him. That's what I told  
10 her. I told her, that fact that she hid him was a felony.  
11 You were harboring a felon, and that's a crime. She goes,  
12 "What are you gonna do?" I go, "I don't know, I'm gonna  
13 think about it. Maybe you should stop seeing this guy."

14 ROSENGREN Do you understand that now you've asked for an attorney  
15 that nothing can be used against you?

16 ALVAREZ Now that I've asked for an attorney?

17 ROSENGREN Um hum. That we cannot use any of your statement against  
18 you? How do you feel about these kids? Do you still love  
19 them?

20 ALVAREZ Of course I do.

21 ROSENGREN How do you think they feel after the weekend that they  
22 spent with you?

23 ALVAREZ They still love me.

24 ROSENGREN How do you think Amanda's gonna feel, say it comes time  
25 for court, and she has to sit there in front of all these  
26 strangers, and tell them about the sexual activities that

EXHIBIT D

DECLARATION OF  
FRANK H. SAUNDERS

I, Frank H. Saunders declare as follows:

1. I am a resident of Santa Cruz County, California.

2. I am self-employed as a consultant in Law Enforcement, Security and Private Investigations (CA Lic. #AA-8900). I am doing business under the name of Frank Saunders & Associates, Inc. My business address is: PO Box 1730, Capitola, CA, 95010.

3. I was employed for fifteen (15) years with the Santa Monica, California, Police Department and hold that agency's highest award, "The Medal of Valor." I worked for over ten (10) years as a FTO (Field Training Officer) and have accumulated experience in all areas of investigation, report writing and evidence handling since 1965. My current CV is also attached and should be considered as a part of this declaration.

4. Presently I am professionally affiliated with the National Association of Chiefs of Police, PORAC (Police Officers Research Association of California), numerous other police officers' organizations and hold both a *Field Training Officer (FTO)* and an *Advanced Certificate* from POST (Commission for Peace Officers' Standards and Training). I am listed as a police expert with the Northern California Defense Counsel's Expert Bank, Americans for Effective Law Enforcement (Chicago, IL), Who's Who in American Law Enforcement (North Miami, FL), and am shown as one of the top 5,000 Court Certified Expert Witnesses in the country by the National Forensic Center (San Diego, CA).

5. I have qualified as an expert and been allowed to testify as an expert witness well in excess of 400 cases in Federal, State and Municipal courts in California, Illinois, Nevada, Arizona, Hawaii, Oregon, Washington, Delaware, North Carolina, Wyoming, Montana, Mississippi, Alaska, Indiana, Pennsylvania, Iowa, New Mexico, Missouri, Tennessee and New Plymouth, New Zealand, since 1981.

6. During that 24 year period, I have been retained by both plaintiffs and such agency/officer/defendants (in both and criminal and civil trials) as the San Diego Police

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Department; the Los Angeles Sheriff's Department; Los Angeles Police Department (twice); San Francisco (twice); Oakland (twice); Sacramento County, CA; Torrance, CA; El Cajon, CA; Santa Cruz, CA; Tustin, CA; Long Beach, CA (twice); East Bay Regional Park District, CA (twice); Sanger, CA; (twice); Los Gatos, CA; Sunnyvale, CA; San Jose, CA (twice); Santa Clara County, CA; Santa Maria, CA Santa Ana, CA; Fullerton, CA; Kern County, CA; Glenn County CA; Westminster, CA; Richmond, CA; Livermore, CA; Compton, CA; Oregon State Police; Spokane, Washington; Klamath Falls, Oregon; County of Maui, Hawaii; County of Asa, Idaho; Wilmington Delaware Police Department; Delaware State Police (four times); New Castle County, Delaware Police Department; Hanford, CA; Hazel Park, Michigan P.D.; Siskiyou County, CA ; the INS; Springfield, IL PD; and Albuquerque, New Mexico (3 times).


7. Based upon my review of the indicated materials (see attached listing) done at the direct request of the indicated Defendant, and weighed against my personal law enforcement training and in particular my in-the-field as well as my investigative experience, dating back to 1965, it is at this time my firm professional opinion that I can never recall a more confusing and convoluted "chain-of-evidence" series of violations, then is clearly demonstrated during this specific instance presently under review.

8. Sequentially, Item #4, described as a "red plaid blanket" on page # 1 (of 2) of the examined San Jose PD "evidence log", was released (03-28-97) from San Jose PD evidence room to the Santa Clara County Crime Laboratory, for supposed testing along with other evidentiary items relevant to this criminal prosecution. However, no indication of the result of any such "testing" being conducted (on this blanket) is shown on the crime lab report (of Criminalist Kathy Benjamin) dated 04-15-97. This red plaid blanket (item #4) is then shown as being returned to the SJPD property room on 11-16-98, along with items #1 through #5. This same item (#4; i.e.: the red plaid blanket) for approximately a one-day period is shown being sent to the SAIU (Sexual Assault Investigative Unit) (on 06-10-98) before being logged back into the SJPD property room the next day (06-11-98). Interestingly enough, it is the next property log entry that is most curious. Although there is no indication that any items were logged out of the property room in 1998, Officer R. Ramos shows a log entry for a "returned property" on June 16 of 1998, *after* the returning entry from the SAIU, dated almost a year later, and not indicating a location from where

these items were returning from. Again, items #1 through #5 (apparently including the same item #4: the blanket in question) were released to court on 06-15-99 but the blanket was not signed back into the property room until 08-04-99 if (apparently) the same Officer R. Ramos, listing of "item #4", as almost an afterthought to that latest log entry indicating that item #5 *returned* on that date.

9. From a careful study of the supplied material, it is totally impossible to accurately ascertain if: (a) item #4 was ever "released" (much less *when* and to *where*, on more than one occasion), if (b), such a determination is only to be based on Officer R. Ramos' various (and missing?) log entries over the history of this quite badly shattered "chain-of-evidence" incident(s), as my to-date-review thus far clearly seems to show.

I hereby declare under penalty of perjury that the matters stated herein are true and correct and are based upon my personal knowledge, and review at this time, and if I were called as a witness, I could testify competently thereto. Executed in the City of Santa Cruz, State of California on this 11<sup>th</sup> day of July, 2005.



Frank H. Saunders



**PEOPLE OF CALIFORNIA vs. ANGEL ALVAREZ**  
**OUR CASE # 25-019**

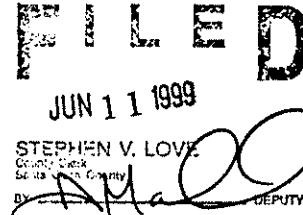
**OCCURRED: 12-13-96**  
**CONTACTED: 06-08-06**

**• MATERIALS REVIEWED**

- Santa Clara County District Attorney's Office letter (02-04-05)  
DA Kimberly A. Connors: to - Frank G. Prantil, Esq.
  - San Jose PD Supplemental Report Case # 96-324-1241 (02-03-05)  
Detective Mark Stephens
  - County of Santa Clara Crime: Report: # M 960659 (04-15-97)  
by Criminalist Kathy S. Benjamin
  - County of Santa Clara Crime Lab: Evidence Management Log  
(05-20-98 through 09-04-98)
  - San Jose PD Property / Evidence Chain of Custody Record (12-13-96)
-

## EXHIBIT E

1 WESLEY J. SCHROEDER  
2 Attorney at Law  
3 181 Devine Street  
4 San Jose, CA 95110  
5 (408) 277-0377  
6 State Bar #59977  
7  
8 Attorney for Defendant,  
9 ANGEL ALVAREZ



7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8  
9 IN AND FOR THE COUNTY OF SANTA CLARA  
10

11 PEOPLE OF THE STATE )	Case No. 198084
12 OF CALIFORNIA, )	
13 Plaintiff, )	NOTICE OF MOTION FOR
14 vs. )	ORDER PERMITTING CROSS-
15 ANGEL ALVAREZ, )	EXAMINATION OF PRIOR
16 Defendant, )	SEXUAL CONTACT OF
17 )	COMPLAINING WITNESS
	Date: June 14, 1999
	Time: 9:00 a.m.
	Place: Judge Emerson
	Department 33

18 TO THE DISTRICT ATTORNEY OF SANTA CLARA COUNTY AND HER  
19 REPRESENTATIVE:

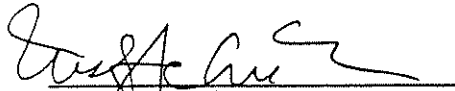
20 PLEASE TAKE NOTICE that on June 14, 1999, at 9:00 a.m.,  
21 or as soon thereafter as the matter may be heard in the  
22 courtroom of Department 33 of the above-entitled court, the  
23 defendant will move for an order allowing cross-examination of  
24 the complaining witness in this case regarding the prior  
25 sexual contact of the witness.

26 This motion will be made on the grounds that prior sexual  
27 contact is relevant and material to the determination of the  
28 credibility of the complaining witness.

206

1 The motion will be based on this notice of motion, the  
2 attached offer of proof, the memorandum of points and  
3 authorities served and filed herewith, on the records on file  
4 in this action, and on such oral and documentary evidence as  
5 may be presented at the hearing on the motion.

6  
7 Dated: 6-11-99

  
WESLEY J. SCHROEDER  
Attorney for Defendant

1 WESLEY J. SCHROEDER  
Attorney at Law  
2 181 Devine Street  
San Jose, CA 95110  
3 (408) 277-0377  
State Bar #59977  
4  
5 Attorney for Defendant,  
ANGEL ALVAREZ  
6  
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9  
10 IN AND FOR THE COUNTY OF SANTA CLARA

11	PEOPLE OF THE STATE )	Case No. 198084
12	OF CALIFORNIA, )	
	Plaintiff, )	POINTS AND AUTHORITIES
13	vs. )	IN SUPPORT OF MOTION
14	ANGEL ALVAREZ, )	FOR ORDER REGARDING
15	Defendant, )	PRIOR SEXUAL CONTACT
16	)	OF COMPLAINING WITNESS

17 Defendant submits the following points and authorities in  
18 support of the motion for an order regarding prior sexual  
19 contact of the complaining witness.

20 I

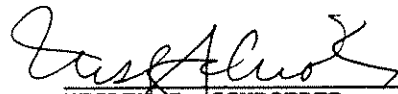
21 THE TRIAL COURT HAS DISCRETION TO  
22 ADMIT EVIDENCE OF THE PRIOR SEXUAL  
23 CONTACT OF THE COMPLAINING WITNESS  
24 IN ORDER TO IMPEACH THE CREDIBILITY  
25 OF THE WITNESS  
26

27 Evidence Code § 782 provides a procedure by which the  
28 trial court is given discretion to admit evidence of the prior

1 sexual contact of the complaining witness to attack the  
2 credibility of that witness, even though the offer concerns an  
3 underlying issue, such as consent, the prior relevant sexual  
4 contact may be admissible. (People v Daggett (1990, 2nd Dist)  
5 225 Cal App 3d 751, 275 Cal Rptr 287; People v Rioz (1984, 5th  
6 Dist) 161 Cal App 3d 905, 207 Cal Rptr 903.)

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6-11-99

  
WESLEY J. SCHROEDER  
ATTORNEY AT LAW

1 WESLEY J. SCHROEDER  
Attorney at Law  
2 181 Devine Street  
San Jose, CA 95110  
3 (408) 277-0377  
State Bar #59977  
4  
5 Attorney for Defendant,  
ANGEL ALVAREZ

6  
7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9  
10 IN AND FOR THE COUNTY OF SANTA CLARA

11 PEOPLE OF THE STATE ) Case No. 198084  
12 OF CALIFORNIA, )  
13 Plaintiff, ) OFFER OF PROOF REGARDING  
14 vs. ) PRIOR SEXUAL CONTACT OF  
15 ANGEL ALVAREZ, ) THE COMPLAINING WITNESS  
16 Defendant, )

17 Defendant ANGEL ALVAREZ, through counsel, hereby submits  
18 the following offer of proof regarding prior sexual contact of  
19 the complaining witness:

20 If called to testify, the following witnesses would state  
21 the following:

22 The complaining witness in this case, Amanda Acosta, was  
23 regularly babysat by defendant, Angel Alvarez. In the course  
24 of his babysitting duties with Amanda she confided in him that  
25 her biological father, Ivan Acosta, had molested her.

26 This was stated to defendant sometime in October, 1996.  
27 At that time she told defendant Ivan had taken her to  
28 McDonald's and then to her grandmother's house. She stated

1 that at her grandmother's she and her father had their clothes  
2 off, and he touched her "down there."

3 After being told of this by Amanda, defendant spoke with  
4 Amanda's mother, Ruby Rubio. He inquired as to whether Ivan  
5 had molested Amanda. When he asked this question, Ms. Rubio  
6 responded by glaring angrily at Amanda and scolding her by  
7 saying, "Why are you opening your mouth, you little bitch?  
8 Don't be talking shit." Ms. Rubio then advised defendant this  
9 matter was none of his business.

10 The complaining witness did contract chlamydia in this  
11 case. There will be medical testimony that it is possible  
12 sexual contact resulting in a chlamydia infection can remain  
13 dormant for some period of time before it shows symptoms.  
14 Since the prosecution is alleging defendant infected  
15 complaining witness with chlamydia, it is important to the  
16 defense to present an alternative explanation as to how this  
17 infection could have been contracted.

18 For this reason, while this does not really involve  
19 sexual conduct by the complaining witness, it does involve  
20 sexual contact imposed upon her by her father. Therefore,  
21 questions of her and her mother, Ms. Rubio, are relevant and  
22 material to the defense in order to establish an alternative  
23 explanation as to how this infection may have occurred.

24 In addition, sometime in late-summer of 1996, Amanda  
25 confided in defendant she had seen her mother and father  
26 kissing each other and "doing nasty things." From the  
27 description given, it appeared that such activity took place  
28 when Amanda slept in the same bedroom with her parents in



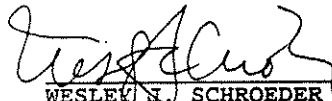
1 Hayward.

2 Because of this statement, which does not involve sexual  
3 activity on the part of complaining witness but does involve  
4 observations of sexual activity by her, it is a material and  
5 relevant inquiry necessary to establish the complaining  
6 witness has observed sex acts in the past which could explain  
7 her ability to describe sexual actions.

8 I declare under penalty of perjury that the foregoing is  
9 true and correct.

10 Executed on 6-11-99, at San  
11 Jose, California.

12  
13 Respectfully submitted,

14   
15 \_\_\_\_\_  
16 WESLEY J. SCHROEDER  
17 Attorney for Defendant  
18  
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## EXHIBIT F

CALJIC 10.55

AGGRAVATED SEXUAL ASSAULT OF A CHILD  
(Pen. Code, § 269, subd. (a))

JAMES G. EMERSON

Judge

[Defendant is accused [in Count 2] of having  
violated section 269, subdivision (a) of the Penal Code, a  
crime.]

Every person who commits [any of] the following acts upon a  
child who is under 14 years of age and 10 or more years younger  
than the person is guilty of the crime of aggravated sexual  
assault of a child in violation of Penal code section 269,  
subdivision (a):

*in that the said Δ did commit a violation  
of Penal Code § 288a by force, violence,  
duress, menace or fear of immediate and  
bodily injury.*  
In order to commit this crime, each of the following unlawful  
elements must be proved:

1. A person committed *a violation of Penal Code § 288a  
by force, violence, duress, menace*
2. The alleged victim was under 14 years of age; and *or fear*
3. The alleged victim was 10 or more years younger than the  
perpetrator of the acts.

CALJIC 10.42

LEWD ACT WITH A CHILD UNDER  
FOURTEEN YEARS—FORCE OR FEAR  
(Pen. Code, § 288, subd. (b)(1))

JAMES C. EMERSON

Judge

[Defendant is accused [in Count 3] of having committed the crime of lewd act with a child by force or fear in violation of section 288, subdivision (b)(1) of the Penal Code.]

Every person who willfully commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 14 years, by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the child or another person, and with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the child, is guilty of the crime of a lewd act with a child by force or fear in violation of Penal Code section 288, subdivision (b)(1).

A "lewd or lascivious act" is defined as any touching of the body of a child under the age of 14 years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party. To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.

[The law does not require that the lust, passions, or sexual desires of either persons be actually aroused, appealed to, or gratified.]

The term "force" means physical force that is substantially different from or substantially greater than that necessary to accomplish the lewd act itself.

[The term "duress" means a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed, or (2) acquiesce in an act to which one otherwise would not have

submitted. The total circumstances, including the age of the victim, and [REDACTED] [her] relationship to defendant, are factors to consider in appraising the existence of duress.]

In order to prove this crime, each of the following elements must be proved:

1. A person touched the body of a child;
2. The child was under 14 years of age;
3. The touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child; and
4. The touching was done by the use of force, violence, duress, menace, or fear of immediate and unlawful injury on the child or another person.

EXHIBIT G

FILED

JUN 17 1999

STEPHEN V. LOVE  
County Clerk,  
Santa Clara County

Jury Note # 1

Received by:

Date: JUN 17 1999

Time: 11:02 am

BY *[Signature]* DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

vs

No. 198524

*[Signature]*  
Defendant,

Photographic Image May Be  
Poor Due To Condition Of  
Original Document.

We, the jury in the above-entitled cause, request the following:

*Please let Court testimony read to  
us at 1:30 p.m. preferably*

Date:

6/17/99

*Juror  
#6*

226

FILED  
JUN 17 1999

Received by:

Date:

Time:

JUN 17 1999

11:07 AM

STEPHEN V. LOVE  
County Clerk  
Santa Clara County

DEPUTY

Jury Note #

2

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

vs

*[Handwritten signature]*

Defendant,

No. *110000*

Photographic Image May Be  
Poor Due To Condition Of  
Original Document.

We, the jury in the above-entitled cause, request the following:

*Is there any more photos of Miranda  
is a non-sexual nature. Please on  
check, or I back.*

Date:

JUN 17 1999

*Juror  
#6*

227



**FILED**  
JUN 17 1999

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

STEPHEN V. LOVE  
County Clerk  
Santa Clara County  
BY *[Signature]* DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA )  
Plaintiff, )

CASE NO. 198084

vs

Angel Alvarez )  
Defendant )

Court's response to juror note # 2

You have been provided all of the  
physical evidence which was admitted  
in the trial. No further evidence will  
be forthcoming. You must base your  
decision on the evidence which was  
presented, and not from any other  
source.

6-17-99

Date

*James C. Emerson*  
Hon. James C. Emerson

221

FILED

Received by: J. Smith  
Date: 6/17/99  
Time: 4:13 pm

JUN 18 1999  
STEPHEN V. LOVE  
County Clerk  
Santa Clara County  
BY: [Signature]

Jury Note # 3

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

vs

Angel Alvarado

Defendant,

No. 198084

We, the jury in the above-entitled cause, request the following:

Can you re-explain great bodily  
injury and help clarify Section  
#12022.8. Does the act have  
to be with the intent of  
causing great bodily injury.  
For example can an infectious  
disease be considered great bodily  
injury.

Date: JUN 17 1999

Juror  
#6

228

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA )  
Plaintiff, )

CASE NO. 198084

VS

Angel Alvarez

Defendant )

Court's response to juror note # 3

For clarification of the definition of "Great Bodily Injury" and Penal Code 12022.5, please see instruction 17.20.1, which is at page 46 of the instructions. The "Great Bodily Injury" must be a consequence of the crime. No specific intent for the infliction of "Great Bodily Injury" is required. Whether an infectious disease can be "Great Bodily Injury" is a factual determination for the jury to decide after applying the jury instruction referenced above.

6-17-99

Date

James C. Emerson  
Hon. James C. Emerson

222

**FILED**

Received by:  
Date: 11:16 JUN 18 1999  
Time:

JUN 18 1999

Jury Note # 4

DEBRA A. LOVE  
CLERK OF COURT  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

vs

Angel Jesus Alvarez

Defendant,

No. 198084

We, the jury in the above-entitled cause, request the following:

Our understanding of CALJIC 17.03  
is that the defendant can be  
guilty of only one of the  
first 3 counts or  
can be not guilty on all  
of the first 3 counts.  
Is this correct?

Date: JUN 18 1999

JUROR  
#6

229

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

**FILED**

JUN 18 1999

STEPHEN V. LOVE  
County Clerk  
Santa Clara County

BY AKC DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA )  
Plaintiff, )

CASE NO. 198084

VS

Angel Jesus  
Alvarez

Defendant )

Court's response to juror note # 4

Your reading of 17.03 is correct.

6-18-99

Date

James C. Emerson  
Hon. James C. Emerson

223

Received by:  
Date: JUN 18 1999  
Time: 1230 PM

Jury Note # 5

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

vs

Angel Alvaroz

Defendant,

No. 198084

We, the jury in the above-entitled cause, request the following:

Count 4 refers to "great bodily  
harm and death." Everywhere  
else in the documentation  
referring to Count 4 it refers  
to "great bodily harm or  
death. Is the and a typo?

Date: JUN 18 1999

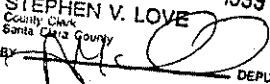
Juror  
#6

230

**FILED**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

JUN 18 1999

STEPHEN V. LOVE  
County Clerk  
Santa Clara County  
BY  DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA )  
Plaintiff, )

CASE NO. 198084

VS

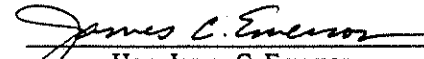
Angel Jesus )  
Alvarez )  
Defendant )

Court's response to juror note # 5

The "and" in the phrase "great bodily  
harm and death" should be read to mean  
"And/or"

6-18-99

Date

  
Hon. James C. Emerson

224

83  
**FILED**

Received by:

Date:

Time:

1:52 PM  
6/18/99

JUN 18 1999  
STEPHEN V. LOVE  
County Clerk  
Santa Clara County

Jury Note #

6

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

VS

Angel Alvarez

Defendant,

No. 198084

We, the jury in the above-entitled cause, request the following:

What is the latest time we  
can submit our verdicts today,  
and have them delivered today

Date: JUN 18 1999

Juror  
#6

231



Received by:  
Date:  
Time:

2:33PM

JUN 18 1999

FILED

JUN 18 1999

STEPHEN V. LOVE  
County Clerk  
Santa Clara County  
BY *AM* DEPUTY

Jury Note # 7

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA  
Plaintiff,

vs

*Anthony Alvarez*

Defendant,

No. 198084

We, the jury in the above-entitled cause, request the following:

*Is there a difference between  
273A(a)(1) and 273a(1).  
The first notation is in the  
description of count 7. The  
2nd notation is on page 32  
in the CALJIC 9.37.*

Date:

JUN 18 1999

*Juror  
#6*

232

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

**FILED**  
JUN 18 1999

STEPHEN V. LOVE  
County Clerk  
Santa Clara County  
BY *[Signature]* DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA )  
Plaintiff, )

CASE NO. 198084

VS

Angel Alvarez )  
Defendant )

Court's response to juror note #

7

The correct code section is  
Penal Code 273a(a). Please refer  
to the Information, and the language  
of Counts 4 and 7 and apply  
CALJIC 9.37 to the language in each count.

6-18-99  
Date

*James C. Emerson*  
Hon. James C. Emerson

225

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA**

**DATE June 17, 1999**

**CASE NO. 198084  
CRIMINAL MINUTES**

**HONORABLE JAMES C. EMERSON**

**Clerk Angela Mavrakakis/ Jennifer Smith  
Deputy Dave Rodriquez**

**Court Reporter L. Traube**

**CASE NAME ; PEOPLE OF THE STATE OF CALIFORNIA VS ANGEL JESUS  
ALVAREZ**

**Michele McKay-McCoy  
Deputy District Attorney**

**Wes Schroeder  
Defense Attorney**

**NINTH DAY OF JURY TRIAL**

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At 9:08 a.m. Court resumes with all parties present to include the Jury and the two alternates. The People proceed with their rebuttal argument. The Court gives the final Jury instructions to the Jury.

The Parties stipulate that the exhibits may go into the Jury room. They further stipulate that should there be read-back the reporter may enter the juryroom for readback. At 9:30 a.m. Deputy Rodriquez is sworn to take charge of the Jury room. The Jury enters the jury room and resumes deliberations.

The Court addresses the two alternates. They are thanked and placed on telephone standby. Court stands adjourned.

At 11:02 a.m. the 1st note is received from the Jury requesting readback at 1:30 p.m. At 11:07 a.m. the 2nd note is received from the Jury. At 11:20 a.m. the Court submits a response to Note #2. At 12:05 p.m. the Jury breaks for lunch.

At 1:16 p.m. the Jury re-enters the Jury room and resumes deliberations. At 1:30 p.m. the reporter Lorna Traube enters the Jury room and proceeds with readback. At 1:52 p.m. the reporter exits the jury room. At 2:53 p.m. the Jury takes a break. At 3:03 p.m. the Jury re-enters the jury room and resumes deliberations.

Page 2  
198084

At 4:13 p.m. the Jury submits note #3. The Court submits a response to the note. At 5:00 p.m. the Jury breaks for the evening. They will resume deliberations on **Friday June 18, 1999 @9:00 a.m. Dept. 33.**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA**

**DATE June 18, 1999**

**CASE NO. 198084  
CRIMINAL MINUTES**

**HONORABLE JAMES C. EMERSON**

**Clerk Angela Mavrakakis  
Deputy Dave Rodriquez**

**Court Reporter L. Traube**

**CASE NAME ; PEOPLE OF THE STATE OF CALIFORNIA VS ANGEL JESUS  
ALVAREZ**

**Michele McKay-McCoy  
Deputy District Attorney**

**Wes Schroeder  
Defense Attorney**

**TENTH DAY OF JURY TRIAL**

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At 8:55 a.m. the Jury enters the Jury room and resumes deliberations. At 10:50 a.m. the Jury takes a break. At 11:00 a.m. the Jury re-enters the jury room and resumes deliberations. At 11:16 a.m. the Court receives note #4 from the Jury. At 12:30 p.m. the Jury submits note #5 to the Court and breaks for lunch.

At 1:30p.m. the Jury re-enters the jury room and resumes deliberations. At 1:52 p.m. the Jury submits note #6 to the Court. At 2:00 p.m. the Court submits a response to notes # 4 & 5.

At 2:02 p.m. Court resumes with all parties present to include the Jury. The People are represented by Deputy District Attorney Jay Boyarsky. The Court proceeds to instruct the jury regarding Note #6 which indicates how long they may . The Jury exits the courtroom and re-enters the jury room to resume deliberations.

At 2:55 p.m. note #7 is received by the Court. At 3:09 p.m. the jury takes a break. At 3:19 p.m. the Jury re-enters the jury room and resumes deliberations. At 3:24 p.m. the Court submits a response to Note #7. At 3:25 p.m. the Jury informs the Deputy that they have reached verdicts.

At 3:32 p.m. Court resumes with all parties present to include the Jury. The People are represented by Deputy District Attorney Delores Carr. The jury indicates that they have reached a verdict. The Court directs the Clerk to read the verdict ;

Page 2 of 2  
198084

Count 1 PC 288.5(A) - NOT GUILTY  
Count 2 PC 269 - GUILTY  
Count 3 PC 288(B)(1) - NOT GUILTY

Allegation to Count 3- PC 12022.8 - NOT TRUE

Count 4 PC 273A(A) - NOT GUILTY  
Lessor included to Count 4 - PC 273A(B) - GUILTY

Count 5 PC 273D(A) - GUILTY  
Count 6 PC 273D(A) - GUILTY

Count 7 273A(A)(1) - NOT GUILTY  
Lessor included to Count 7 - PC 273A(B) - GUILTY

The Court directs the Clerk to poll the Jury. All twelve jurors indicate that this is their true and correct verdict. The Court directs the Clerk to record the verdict. The Court thanks the Jury and they are released from their admonition. The Defendant is remanded into custody. The Property bond is exonerated. Time is waived for sentencing and the matter is set for **August 13, 1999 @9:00 a.m. Dept. 33.**

303